Petition

81-1622

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PUEBLO OF SANTO DOMINGO,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Were established principles of law, and the lofty federal policy in favor of protecting Indian land, breached by the Court of Claims' refusal to relieve petitioner from an unauthorized and void stipulation that profoundly altered and diminished petitioner's claim under the Indian Claims Commission Act, and that will, if uncorrected, cause a wholesale loss of tribal lands?

2. Where petitioner, a small, very traditional Pueblo Indian tribe, did not learn of the unauthorized stipulation until several years later, and only after futilely attempting to have its attorneys withdraw it, discharged those attorneys and move through new counsel for relief from the

stipulation, does the single fact that several years elapsed, by itself, bar petitioner from relief, irrespective of the circumstances, and even though the stipulation was directly contrary to the original petition, clear commands of Congress and a long line of decisions of this Court, and will result, in effect, in a judicial sale of 77,000 acres of tribal land without the consent of Congress or petitioner?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Claims herein, for the reasons stated below.

OPINIONS BELOW

The opinion of the Court of Claims of which review is sought herein, dated April 22, 1981, is set forth at Appendix A to this petition (the Appendices are bound separately), and is reported at 647 F.2d 1087 (Ct.Cl. 1981). The order of that court denying petitioner's motion for rehearing and suggestion for rehearing en banc, dated October 2, 1981, is set forth at App. B, and is unreported. The opinion and order of the Indian Claims Commission which petitioners sought below to vacate, dated May 9, 1973, is set forth at App. F, and is reported at 30 Ind. Cl.Comm.

234 (1973). The opinion of the Court of Claims affirming that decision, which petitioners also sought to vacate, is set forth at App. G, and is reported at 206 Ct.Cl. 649, 513 F.2d 1383 (1975)

JURISDICTION

The decision of the Court of Claims of which review is sought herein was rendered on April 22, 1981. A timely motion for rehearing was denied on October 2, 1981. On December 30, 1981, Chief Justice Warren Burger signed an order extending the time within which this petition for writ of certiorari could be filed to March 1, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1255(1).

STATUTORY PROVISIONS INVOLVED

25 U.S.C. §70a (in part):

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United

States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

25 U.S.C. §70u:

(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the

Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

25 U.S.C. §177 (in part):

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless

the same be made by treaty or convention entered into pursuant to the Constitution.

Act of February 27, 1851, ch. 14, §7, 9 Stat. 574, 587:

And be it further enacted, That all the laws now in force, regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes in the Territories of New Mexico and Utah.

Pueblo Lands Act, ch. 331, §17, 43 Stat. 636, 641 (1924) (in part):

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other

manner except as may hereafter be provided by Congress, . . .

STATEMENT OF THE CASE

I. INTRODUCTION

In all the extensive body of law that has been developed over the past two centuries to define the relationship between the federal government and the Indian tribes, probably no principle is so well established as that which holds that Congress alone has the power to take Indian lands. Yet by virtue of the decision which petitioner asks this Court to review, petitioner, a small, very traditional Pueblo Indian tribe in northern New Mexico, faces the loss of 77,000 acres of its land, and possibly more, not by any act of Congress, nor by any cession by the tribe, but solely as the result of an unauthorized act of petitioner's former attorneys -- a stip-

ulation that amounted to a surrender of petitioner's title to its land. That stipulation was in conflict with the pleadings in this case, with the attorneys' contract with petitioner, and with federal case and statutory law governing protection of Indian land, and it was executed and filed wholly without the knowledge or consent of the petitioner.

The Court of Claims, however, over a vigorous dissent, refused to relieve petitioner of the effect of this wrongful stipulation, or of the subsequent interlocutory order of the Indian Claims Commission based thereon. The court did not mention the reasons petitioner gave for the delay in seeking this relief nor did it address the questions of the attorneys' authority or the legal correctness of the stipulation. It denied petitioner's

motion on the sole ground that too much time had passed since the stipulation.

Petitioner originally filed this claim seeking damages for trespass on its lands. It suddenly finds itself facing the loss of those lands, which are essential to petitioner's cultural and economic livelihood. This manifest injustice can be avoided only by the intervention of this Court.

II. FACTUAL SETTING

Petitioner, the Pueblo of Santo Domingo has been situated along the banks of the Rio Grande River in northern New Mexico since pre-Columbian times. Though primarily agriculturalists, its members have also utilized their land for hunting and gathering, for a variety of religious and ceremonial purposes, and, since the earliest contacts with the Spanish, for

grazing.

Unlike many Indian tribes, petitioner has maintained the vitality of its traditional cultural and political institutions up to the present day. The petitioner's governing body, the tribal council, consists of about 40 elders, few of whom speak English or have much familiarity with Anglo society or institutions. Their decision-making processes are consensus-oriented, and decisions about matters as foreign and complex as a legal position in litigation involving the tribe are considered at great length before any decision is reached. Where a matter has to do with tribal land, it is treated with the utmost solemnity, moreover. App. 42h-43h; 49h-56h.

Beginning around the turn of the century, Americans began to move onto scattered parcels of petitioner's land.

The tribe had no resources by which it could have them removed, and the United States took no action against them on the tribe's behalf. On a few occasions, especially in the 1940's, the United States itself began to utilize some of petitioner's lands, and permit them out to third parties, without the tribe's consent.

In 1946, Congress passed the Indian Claims Commission Act, 25 U.S.C. §§70 - 70v, to provide a forum in which claims of wrongs, legal and moral, perpetrated by the United States against the Indian tribes, could be heard and decided, once and for all. Petitioner, like many other tribes, engaged counsel to prosecute its claims against the United States, and the focus of its claims was the unauthorized use of petitioner's lands by others, including the government.

III. THE COURSE OF THIS LITIGATION

Most of the hundreds of claims filed under the Indian Claims Commission Act sought damages for uncompensated or inadequately compensated takings of Indian land by the United States. The claim filed by petitioner Santo Domingo on August 11, 1951, however, was unusual, in that it expressly denied that any of petitioner's land had been validly taken. The petition asked damages not for takings of its land, but for acts of the United States that had resulted in interference with the Pueblo's continuing exclusive rights to its land, and for the United States' breach of its trust obligations in failing to protect the Pueblo's rights as against third party trespassers. See

generally, Petition, App. C, esp. ¶6.[1]

In positing its claims on the premise that virtually all of petitioner's lands were still owned by it under Spanish, Mexican, and American law, the petition correctly reflected the view of petitioner's leadership. See, e.g., App. 9h-11h, 14h-16h, 27h, 31h-33h, 37h-38h, 54h-55h. Moreover,

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[1] Felix S. Cohen, then Associate Solicitor of the Department of the Interior and the author of Handbook of Federal Indian Law, the most authoritative work in the field up to the present day, observed in Original Indian Title, 32 Minn. L. Rev 28, 34-38 (1947), that contrary to prevailing belief, the United States did not steal, but actually bought and paid the Indians for virtually all of the continental United States outside of Alaska. Mr. Cohen's exhaustive research had disclosed only a few areas where Indian lands had not been acquired by the government, and New Mexico was one of the areas he listed. Id. at 36, n. 19. Mr. Cohen worked on the Santo Domingo claim in the Indian Claims Commission for several years, until his untimely death in 1953, at the age of 46. It is entirely possible, in fact, that he helped draft the petition.

the petition was fully consistent with applicable case and statutory law regarding protection of Indian land, a subject in which Congress has repeatedly expressed strong interest, 25 U.S.C. §177; Pueblo Lands Act, ch. 331, §17, 43 Stat. 636, 641 (1924) (ante at 6-7), and as to which this Court has consistently upheld rigid standards. See discussion infra, at 33-35.

It is thus striking that one of the first substantive documents filed in the case after the petition and the government's answer (App. D) was a "Stipulation as to Standing to Sue, Liability and Area" (App. E), filed in late 1969. By that stipulation, the attorneys for petitioner and the United States agreed, among other things, on the boundaries of the lands claimed by petitioner, and that "the Defendant

is liable for extinguishing the Petitioner's title to said area." Stipulation, ¶¶2, 3, App. 2d. As the Court of Claims acknowledged in the opinion of which review is sought herein, that stipulation "represented a significant change in the theory of the case." Pueblo of Santo Domingo v. United States, 647 F.2d 1087 (Ct. Cl. 1981), (hereinafter referred to as "Santo Domingo II"), at 1088; App. 2a. Rather than a claim for damages for trespass, the case had suddenly become one solely for damages for takings of the petitioner's lands by the United States, a theory directly contrary to that of the original petition.

At no time did petitioner's attorneys seek authority from petitioner to make this fundamental change in the claim, nor did they even explain to petitioner's leaders that they were

doing so on their own. The members of petitioner's tribal council never even knew of the stipulation, or of the change it made in their claim, until many years later. App. 9h-10h, 17h, 27h-28h, 33h-34h.

The Indian Claims Commission did not question the stipulation, or the claims attorneys' authority to execute it, did not require an amendment of the pleadings to conform to it, and did not inquire into the question whether there had in fact been an actual "taking" of petitioner's lands. It merely accepted the assumption that the lands had been taken, and proceeded to a determination of the dates of taking and of the value of the lands as of those dates. Briefs were submitted on the question of the taking dates, and on May 9, 1973, the Commission issued its opinion, findings of fact and order establishing the

dates, in which it incorporated the terms of the 1969 stipulation. Pueblo of San Ildefonso, et al., v. United States, 30 Ind. Cl.Comm. 234 (1973); App. F. On appeal by the United States, the Court of Claims affirmed the Commission on all issues. Pueblo of San Ildefonso, et al., v. United States, 206 Ct. Cl. 649, 513 F.2d 1383 (1975); App. G.

Significantly, both the I.C.C. and the Court of Claims opinions consisted primarily of reasons for rejecting the taking dates proposed by the United States.[2] Having dispensed with the

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[2] The United States urged that petitioner's lands outside its present reservation were taken in 1858, when Congress confirmed petitioner's title to its Spanish grant. Act of December 22, 1858, ch. 5, 11 Stat. 374. Alternatively, the United States proposed 1905 as the taking date, on the ground that

government's contentions, the Commission simply accepted the dates proposed by the petitioner's counsel, and the Court of Claims summarily affirmed those dates. 513 F.2d at 1391; App. 25g. Neither opinion actually considered whether the events proffered by the petitioner's counsel as having effected the alleged takings[3] could have constituted lawful takings of

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[2] (con't) by then, non-Indian settlement on pueblo lands had so seriously interfered with the pueblo's rights as to effectuate an extinguishment of its title. Neither the Commission nor the Court of Claims found either argument tenable. 30 Ind.Cl.Comm. at 237-242, App. 6f-13f; 513 F.2d at 1386-1390, App. 8g-21g.

[3] The events proposed, and accepted by the I.C.C., were the presidential proclamation setting aside certain lands as the Jemez Forest Reserve, dated October 12, 1905; the creation of Grazing District No. 1 in New Mexico by an order of the Secretary of the Interior, on June 12, 1941, 6 Fed. Reg. 3040 (1941), and the issuance

Indian land under the decisions of this court. The Court of Claims opinion, indeed, evinced some uneasiness on that question. But as that court said, "We must have a date (or dates) in order to place a value on the property taken," even though "the record is devoid of any single occurrence or incident to serve as the event when the United States decisively and all at once grasped [petitioner's] aboriginal ownership rights in their entirety." 513 F.2d at 1391; App 23g-24g.

In mid-1974, petitioner obtained funds with which it hired Mr. Richard L. Young as tribal attorney for one year. In early 1977, Mr. Thomas E. Luebben was

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[3] (con't) of federal patents to third parties under the public land laws. See 30 Ind. Cl. Comm. at 236 - 237; App. 4f-5f.

hired as tribal attorney. Pueblo officials had emphasized to both Mr. Young and Mr. Luebben that protection of petitioner's land was a top priority, and both attorneys concentrated their attention on the status of petitioner's claims in the I.C.C. litigation.

Before Mr. Young's employment ended, he had learned enough about the case and Indian land law to become aware that there was something very wrong with the claims attorneys' position that Santo Domingo's lands had been taken by the United States. He questioned them on their legal theories (App. 39h-40h, 61h), but they adamantly adhered to their position. Mr. Luebben also became convinced that the claims attorneys had seriously erred in changing the theory of the claim, and he urged them to withdraw the stipulation. The claims

attorneys would not yield, however. They eventually informed petitioner, in late 1978, that they would not participate in the case further if the petitioner insisted on maintaining that its title was still valid. (App. 65h-69h).

Faced with that ultimatum, in October, 1979, petitioner discharged its claims attorneys and hired Mr. Luebben's law firm to prosecute the claim. At a status conference on October 17, 1979, Mr. Luebben informed Trial Judge Yannello (the case having by then been transferred to the Court of Claims under 25 U.S.C. §70v (1981 Supp.)) that the petitioner would file an appropriate motion for leave to return the theory of the claim to that of the original petition, one of unextinguished title.

Transcript of Proceedings, October 17, 1979, at 33-34.

The motion (App. 1h), filed on November 23, 1980, asked the court to vacate the Indian Claims Commission order of May 9, 1973 (App. 75f).[4] It was accompanied by a memorandum of 171 pages, and 34 documentary exhibits (the most pertinent of which are included in App. H). In its motion and memorandum, petitioner emphasized three principal points:

1) To the extent the stipulation conceded a taking of the Pueblo's lands, it was contrary not only to the petition but more important to numerous cases decided by this Court and to a longstanding and emphatic policy of

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[4] At the same time, petitioner filed a "Withdrawal from Stipulation." Both items were treated as a single motion by the Court of Claims.

Congress that only Congress can extinguish Indian title, and then only by clear expressions of intent to do so;

2) The claims attorneys had no authority to enter into the stipulation, they had never informed the Pueblo of their intention to change the theory of the case, the Pueblo had never authorized such a change, and the change seriously compromised or "adjusted" the claim within the meaning of paragraph 5 of the claims attorney contract, and thus was beyond the attorneys' power to make without the express approval of the Commissioner of Indian Affairs; and,

3) Inasmuch as the order was merely interlocutory; the Pueblo had, as soon as it had a reasonable opportunity to learn of the stipulation and subse-

quent order, taken all reasonable steps to correct the situation; and to refuse to relieve the Pueblo of the stipulation would work an unconscionable injustice, in that the Pueblo would be faced with the loss of its lands under 25 U.S.C. §70u, considerations of fairness and equity militated strongly in favor of vacating the prior order and allowing the petitioner to withdraw from the stipulation.

The United States filed a four-page response. It did not deny any of petitioner's factual assertions or even suggest that petitioner was wrong in contending that its land had never been taken by the government, and it made no argument that it would be prejudiced by the granting of the motion. It merely asserted that petitioner had waited too long to seek to vacate the I.C.C. order, and that

that order was now the "law of the case."

Without hearing oral argument, the Court of Claims denied the motion, in a 2-1 decision. (App. A) The short majority opinion conceded that an attorney cannot surrender his client's rights by entering into an unauthorized stipulation, but, relying primarily on an Illinois appellate decision, observed that unreasonable delay in seeking relief from such a stipulation will by itself bar such relief. The court viewed the delay here, which it calculated at twelve years, as being "egregiously outside the permissible range of delay." Santo Domingo II, 647 F.2d at 1089; App. 5a. The court did not discuss any of the substantive issues raised by petitioner's motion, nor did it examine the facts that had resulted in the fatal delay to see whether, under all the circumstances, the delay was actually unreasonable.

Judge Nichols dissented, noting that petitioners "may have a prima facie case" of a breach of their authority by petitioner's former claims counsel, and favoring a remand to the trial judge for fact-finding on the circumstances leading to the 1969 stipulation. He expressed the view

> that in the case of Indian litigants the ICC and this court [are] required not to visit on Indians the consequences of defective representation or attorney misconduct, which under the normal operation of the adversary system would be fatal to a claim.

647 F.2d at 1092, App. 17a. Judge Nichols pointedly criticized the majority for its "cavalier" treatment of the motion, especially its disregard of petitioner's explanation for the delay.

Petitioner's motion for rehearing was denied on October 2, 1981, in a one-page order (App. B), from which Judge Nichols also dissented.

Petitioner now finds itself facing an injustice at least as cruel as any the Indian Claims Commission was created to remedy. To pursue its case in the Court of Claims to judgment, as the case is presently framed, will in all likelihood result in the forfeiture of petitioner's title to at least the 77,000 acres of land directly affected by the 1969 stipulation and the subsequent I.C.C. order, and perhaps other lands as well, by virtue of the operation of 25 U.S.C. §70u (ante at

4-5).[5] For the loss of these valuable lands, petitioner will be awarded compensation probably amounting to less than three dollars per acre, a trivial sum compared to their present value. These lands, moreover, have enormous and unquantifiable cultural and religious values for petitioner that make them

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[5] Theoretically, petitioner could ask the Court of Claims for leave to dismiss this case, without prejudice, as a way of preserving its title to its land. There is no reason to believe that that would be effective, however. Even if the court were to grant such a motion, the 1975 opinion in the case would very likely be given collateral estoppel effect to bar any later claims seeking to oust the United States or third parties from those portions of the land they now occupy, and it could even result in ousting petitioner from those areas it still controls. Besides, such an option would cause petitioner to surrender claims to perhaps millions of dollars in trespass damages that Congress plainly intended to be heard and decided under the Indian Claims Commission Act.

unique and irreplaceable. App. 10h-11h, 33h, 38h, 54h-55h.

In short, unless this Court now reviews, and reverses,[6] the April 22, 1981, decision of the Court of Claims, petitioner will suffer manifest injustice. As will be shown in the next section, petitioner believes that the reasons for this court to hear this case are compelling, both because of the importance of the interests at stake, and because of the fundamental impropriety in the treatment of this matter by the court below.

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[6] Petitioner believes that this case is clearly appropriate for plenary consideration by this Court. But especially given the extensive record petitioner made below, petitioner would also suggest that this Court could properly summarily reverse the Court of Claims without the need for full briefing and argument here.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW APPROVES A TAKING OF INDIAN LAND BY AN UNAUTHORIZED ACT OF COUNSEL, CONTRARY TO A STRONG FEDERAL POLICY FAVORING PROTECTION OF INDIAN TITLE THAT THIS COURT HAS FREQUENTLY AND EMPHATICALLY ENFORCED

This case requires the intervention of this Court to enforce Congress' oft-repeated command that Indian tribes' rights to their land be accorded the same protections as that enjoyed by the United States itself, and that such land be taken from tribes, if at all, only pursuant to explicit authority of Congress. Rooted in ancient doctrines of international law, the rule that the sovereign alone could treat with the Indians for land provided not only a way to prevent overlapping and conflicting grants, but more

important, a highly valuable economic monopoly on land acquisition. Cohen, Handbook of Federal Indian Law (UNM ed. 1971), at 46-47; Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 572-574 (1823).

One of the first pieces of legislation enacted by Congress under the new Constitution was the Indian Non-Intercourse Act, ch. 33, 1 Stat. 137 (1790), the fourth section of which prohibited acquisition of land from Indian tribes by anyone except the United States, and then only under authority of Congress.[7] When the United States acquired what is now the American Southwest under the Treaty of Guadalupe

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[7] That Act was subsequently renewed several times, until permanent legislation to the same effect was enacted by the Act of June 30, 1834, ch. 161, 4 Stat. 729, section 12 of which is now codified as 25 U.S.C. §177.

Hidalgo, 9 Stat. 922 (1848), Congress moved quickly to extend the provisions of the Non-Intercourse Acts over the Indians in that region. Act of February 27, 1851, ch. 14, §7, 9 Stat. 574, 587 (ante at 6). And in 1924, after this Court's decision in United States v. Sandoval, 231 U.S. 28 (1913), had made plain the fact that the Pueblo Indians of New Mexico were subject to the protections of federal Indian law, Congress, in enacting a law to aid persons who had established good-faith occupancy on Pueblo lands, reiterated that the stringent protections accorded other Indian lands were equally applicable to the Pueblos. Pueblo Lands Act, ch. 331, §17, 43 Stat. 636, 641 (1924) (ante at 6-7).

The importance attached by Congress to the protection of Indian

land from involuntary loss has been mirrored by the decisions of this Court. As early as Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835), this Court observed that Indian's rights in their lands are "as sacred as the fee-simple of the whites." And see, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823); Worcester v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); Choteau v. Molony, 57 U.S. (16 How.) 203, 239 (1853). In Holden v. Joy, 84 U.S. (17 Wall.) 211, 244 (1872), this Court held that Indian land was not subject to the operation of the public land laws, and in Buttz v. Northern Pacific Railroad, 119 U.S. 55 (1886), it was held that even a grant of lands to a railroad by Congress was subject to Indian title to the land, until Congress acted specifically to ratify the tribe's

cession of the land. Jones v. Meehan 175 U.S.1 (1899), and Cramer v. United States, 261 U.S. 219 (1923), made clear that even actions of the executive branch of the government in issuing leases and patents were ineffective to take Indian lands, that only Congress had that power. That point was repeated with emphasis in United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941), a case that resulted in the return to the Hualapai Indians of 509,000 acres of land that had previously been patented to the railroad. Cohen, Original Indian Title, 32 Minn. L. Rev. 28, 33 (1947).

The continued force of these principles has been demonstrated more recently, in Oneida Indian Nation v County of Oneida, 414 U.S. 661 (1974), and Wilson v. Omaha Tribe, 442 U.S. 653

(1979). In Oneida, this Court carefully reviewed the above-cited body of case law and noted once again that "federal law now protects, and has continuously protected from the formation of the United States, possessory right to tribal lands." 414 U.S. at 677. Wilson involved the interpretation and application of 25 U.S.C. §194, a statute that requires "white persons" to bear the burden of proof in a title contest with an Indian, once the Indian has made out a prima facie case of prior possession or ownership. This Court viewed the statute as an additional indication of Congress' long-standing concern with protection of Indian land rights against interference by private parties, and gave it full effect in that case.

The decision below herein, and the events that prompted it, are entirely irreconcilable with this consistent body of case and statutory law. What Congress and this Court have repeatedly and firmly denied to private citizens, corporations, states, and federal officials -- the power to take Indian lands -- the Court of Claims has granted to attorneys, acting without authority and in direct violation of their instructions. The situation closely resembles that in Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927), where this Court held that an attorney who claimed authority to represent the Pueblo in a suit to establish the Pueblo's rights to a vast tract of land, which authority was purportedly given by a deed executed by a Pueblo official conveying the tract to the attorney's predecessor, in fact

had no power to maintain the suit, as the deed was not authorized by the Pueblo Council, or approved by Congress.

Here, the attorneys had authority to represent the tribe in its claim, but there is no evidence that the tribe ever authorized any concession that its title had been lost, and petitioner fervently denies that its attorney had any such power. As in Santa Rosa, no decision to surrender petitioner's title to its lands could have been made, "or any interest of the Indians conveyed without previous deliberation for that purpose on the part of the Indians in council, and . . . no such council was ever assembled." Id. at 318.

It must further be noted that just as the act of the claims attorneys in stipulating away petitioner's title to

its lands, and the sanctioning of that unauthorized act by the Court of Claims, ran roughshod over the strong federal policy in favor of guarding Indian property, so were the claims attorneys' legal arguments as to dates of "taking" of petitioner's land utterly inconsistent with the case law set forth above. It requires no extended analysis to demonstrate that neither a presidential proclamation declaring lands to be within a national forest, nor an order of the Secretary of the Interior establishing a grazing district, nor the issuance of patents to private parties, see n. 3, supra, satisfies the rigid requirements of Santa Fe Pacific, Cramer, and the numerous other decisions cited above, for a valid taking of Indian lands. The 1969 stipulation,

thus, was as legally unsound as it was unauthorized.

Protection of Indian land from unauthorized alienation has long been the special province of the federal courts: that was the basis for the holding in Oneida Indian Nation. Here, the Court of Claims has enshrined a taking of Indian land effected with the consent of neither the Congress nor the tribe, and over the tribe's vigorous objection. Only this Court can prevent such a blatant undermining of this singular federal policy.

II. THE CURT REFUSAL OF THE COURT OF CLAIMS TO RELIEVE PETITIONER OF THE EFFECT OF THE UNAUTHORIZED 1969 STIPULATION WAS SO CLEARLY ERRONEOUS AND ARBITRARY, ESPECIALLY IN VIEW OF THE WEIGHTY INTERESTS AT STAKE, AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The opinion below erected an irrebuttable presumption that the passage of a given period of time, without more, constituted a ratification by petitioner of the 1969 stipulation, and thus a complete bar to any relief from its effect. The dissent called the court's action "'an exercise of raw judicial power,'" Id. at 1093, App. 21a (quoting Roe v. Wade, 410 U.S. 113, 222 (1973), White, J., dissenting) (emphasis added by Judge Nichols). Petitioner submits that the court's total disregard of any facts but those derived from a calendar; its utter lack of concern

for protection of Indian land, the unique nature of claims under the Indian Claims Commission Act, or the question of attorney misconduct; and its blind insistence that this case be speeded on to some conclusion, considerations of justice and fairness notwithstanding, amount to a grave breach of accepted standards of jurisprudence. Especially in light of the strong federal interests jeopardized by the decision below, this Court's intervention is essential.

A. The court below clearly erred in holding that the passage of time, alone, required denial of petitioner's motion.

Wholly apart from the grave considerations favoring petitioner's motion, the arbitrary treatment by the court below of the issue of delay exhibited total lack of regard for

the facts or the applicable law. The court's sole concern was the length of time that had passed from entry of the stipulation to the motion. The cases are clear in holding that it is lack of "due diligence" and prejudice to the opposing party, however, not time alone, that bars relief such as that sought here. See, e.g. Costello v. United States, 365 U.S. 265 (1961); Ute Indian Tribe v. Probst, 428 F.2d 491 (10th Cir. 1970), cert. denied, 400 U.S. 926 (1970); Klaprott v. United States, 335 U.S. 601 (1949), modified, 336 U.S. 942 (1949). "Due diligence" can be determined only by considering the facts responsible for the delay, an analysis wholly absent from the opinion below; and the United States had made no claim of any possible prejudice.

Petitioner showed, moreover, that under all the circumstances, it had

acted reasonably and diligently in trying to protect its rights. The 1969 stipulation was never shown to petitioner's leadership, nor were they even informed of it, until very recently. App. 9h-10h, 16h-18h, 17h-28h, 33h-34h. The earliest point at which petitioner could reasonably be charged with notice of it would be during Richard Young's tenure, in 1975, and the record shows that from that time through 1978, Mr. Young, and his successor as tribal attorney, Thomas Luebben, were attempting on behalf of petitioner to get the claims attorneys to change their position on the taking issue. App. 38h-41h, 47h-49h, 61h-64h. It must be remembered that both Mr. Young and Mr. Luebben were new to this field, and that the claims attorneys were, even then, widely respected for their work in Indian claims litigation.

It was thus not unreasonable that Mr. Young and Mr. Luebben sought to persuade, rather than to discharge, the claims attorneys, until the impasse become unavoidable in November, 1978. App. 65h-69h. Thereafter, it took petitioner one year, until October, 1979, to reach the difficult decision that only by discharging its claims attorneys could it protect its land. Given the inherent difficulties that face petitioner in making such complex and troubling decisions, see App. 42h-43h, 49h-56h, however, that delay plainly ought to be excusable. And that it took Mr. Luebben another year to review the extensive case file and complete the massive research and assemble the documentation required to file the Motion to Vacate should not have prejudiced that motion, inasmuch as the trial judge and the United States

had been on notice since the October 17, 1979, status conference of exactly the position petitioner intended to assert.[8]

These facts should have been considered by the court below in assessing petitioner's diligence, but they are not even noted. Yet in Klaprott v. United States, 335 U.S. 601 (1949), the same kind of equitable considerations led this Court to decide that a delay of four and one-half years did not preclude reopening a final default judgment; and in United States v. Karahalias, 205 F.2d. 331 (2d Cir. 1953), a 17-year delay in seeking to reopen a judgment was excused by the Second Circuit.

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[8] It might be recalled that it took the United States more than four years just to file its answer to the petition herein.

Petitioner, here, moreover, was not seeking to reopen a final judgment, but rather an interlocutory decision in a case still in active litigation.[9] In

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[9] The court below regarded the 1975 opinion as a "final judgment" under its Rule 131(c). Petitioner believes this was error, since the case was governed by Indian Claims Commission procedures, which included no comparable rule. The I.C.C. had often revised interlocutory decisions after the passage of many years, occasionally with Court of Claims approval. See, e.g., Seminole Nation v. United States, 28 Ind.Cl.Comm. 117, 127 (1972) (setting aside 17 Ind. Cl. Comm. 67 (1966)); Snoqualmie Tribe v. United States, 178 Ct.Cl. 570, 372 F.2d. 951 (1967); Confederated Tribes of the Warm Springs Reservation v. United States, 177 Ct.Cl. 184 (1966). In Caddo Tribe v. United States, 155 F.Supp. 727 (Ct.Cl. 1957), in fact, the Court of Claims refused to review an interlocutory decision of the I.C.C. dismissing part of a claim precisely because of its lack of finality, observing at 738, that "until final judgment is entered . . . the Commission is at liberty to alter" the decision. It is difficult to see why the 1973 I.C.C. order herein was not similarly subject to revision, should good grounds exist therefor and absent prejudice to the United States.

Simmons Co. v. Grier Bros. Co., 258 U.S. 82 (1921), this Court held that an interlocutory order, even one that practically disposes of the merits of the case and has been affirmed on appeal, may be modified or rescinded at any time prior to entry of a final decree. And see Marconi Wireless Telegraph Co. v. United States, 320 U.S. 1 (1943). Certainly in such a situation, the passage of time should be regarded as less prejudicial than in the case of a final judgment. And at a minimum, the failure of the court below to consider either the facts that caused the asserted delay, the lack of prejudice to defendants, or the other substantial considerations raised by petitioner's Motion to Vacate, underscores the illegitimacy of the court's wooden invocation of delay as its "single response" to petitioner's

motion.[10]

B. The opinion below subjects petitioner to gross injustice by virtue of a stipulation that was, under the "hornbook law" relied upon by the court, utterly void.

The opinion below recited rules of agency supporting petitioner's contentions that it ought not be bound by the 1969 stipulation, or the subsequent

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[10] The court indicated that its principal motivation was a desire to "wind up" the cases filed under the Indian Claims Commission Act. 647 F.2d at 1089; App. 6a. But an understandable desire to expedite litigation cannot justify trampling on the fundamental rights of litigants. Nor is there any reason to believe that in terminating the Indian Claims Commission and transferring its few remaining cases to the Court of Claims Congress intended to subvert the beneficent purposes that led to the creation of the Commission in the first place. Intervention by this Court is needed here, to insure that in this case and other pending Indian claims, a misguided sense of mission does not lead the Court of Claims to exalt speed over all other considerations, and thereby aggravate the injustices that originally spawned these claims.

order based thereon, because its attorneys had no authority, express or apparent, to make such a dramatic concession in the claim. 647 F.2d at 1088-89; App. 3a-5a. The court reasoned, however, that what it viewed as the "rebuttable presumption" that the attorneys did have that authority became irrebuttable solely due to petitioner's delay in seeking relief. 647 F.2d. at 1089; App. 5a. The very rules recited by the court, however, also carefully provide that no presumption of authority can arise at all, where the adverse party and the court are aware that the attorney is actually acting beyond his authority. That is precisely the case here.

The petition that initiated this claim, of which, both the I.C.C. and the United States obviously had notice, correctly stated petitioner's theory of

the claim, and must be viewed as petitioner's instructions to its attorneys as to how the claim was to be pursued. For petitioner's counsel to come forward with a stipulation, not to any disputed facts, but to legal conclusions[11] (the factual basis for which had not even been determined), having the effect of ceding to the United States 77,000 acres of petitioner's land, was such a profound departure from the petition that neither the attorneys for the United States nor the I.C.C. could reasonably have

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11 This Court has held that a stipulation by the parties as to a legal conclusion is not controlling and may be treated as "a nullity." Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 289 (1917). The Court of Claims has recognized the applicability of this rule in Indian claims litigation. Sac. and Fox Tribe v. United States, 315 F.2d. 896, 901 (Ct.Cl. 1963).

assumed that the attorneys were acting within their authority.

The limitations on the claims attorneys' power were made more explicit by their contract with petitioner (which had been approved by the United States and filed with the Commission; see 25 U.S.C. §70n; 25 C.F.R. §503.34a, 33 Fed. Reg. 9236 (1968)). The contract provided, at paragraph 5, that the attorneys "shall not make any compromise, settlement, or other adjustment of the matters in controversy unless with the approval of the Commissioner of Indian Affairs." App. 59h. Unquestionably, a stipulation that surrendered title and trespass damage claims to 77,000 acres of tribal land, in exchange for a few dollars per acre, was a "compromise" or "adjustment" of petitioner's claim, and no approval

thereof was ever sought or obtained by the claims attorneys. Hallet Aff., App. 58h-59h.

Not only were both the United States and the I.C.C. on notice of that provision, but the United States had actually tried to use it against petitioner earlier in the proceeding. The Jicarilla Apache Tribe's claim in Docket No. 22-A overlapped with areas claimed by petitioner and other pueblos, and to avoid a conflict petitioner's counsel in 1959 stipulated with the Jicarillas as to the boundary between the two claims. The United States promptly moved to have the stipulation declared void, on the ground that it "adjusted" petitioner's claim, and had not received the Commissioner's approval as required by the attorney contract. (The stipulation was subsequently submitted to and approved by the

Commissioner, and the I.C.C. entered an order approving it on July 21, 1959.)

One is tempted to suggest that when, ten years later, the United States agreed to a stipulation that effectively surrendered to it 77,000 acres of petitioner's land, without calling for approval of this drastic concession by the Commissioner, or other verification of the attorneys' authority, it was exhibiting something less than complete good faith, particularly in light of the unambiguous assertion of title in the petition. It is certainly true that cases under the Indian Claims Commission Act have not been viewed as ordinary adversary litigation. The legislation was intended to be remedial of grave wrongs done to the nation's wards, and the Court of Claims itself occasionally acknowledged a duty to help insure that the Indians' claims were fully and

fairly heard. See e.g., Otoe and Missouria Tribes v. United States, 131 Ct.Cl. 593, 625-626 (1955), cert. denied, 350 U.S. 848 (1955); Sioux Tribe of Indians v. United States, 182 Ct.Cl. 912 (1968); Santo Domingo II, 647 F.2d. 1087, 1092 (Ct.Cl. 1981) (Nichols, J., dissenting); App. 17a. The remedial purposes of the Act, together with the special responsibility of the United States to protect Indian land, should impose on the Commission an obligation to insure that, at the least, Indians are not cheated out of their land in the course of pursuing claims for past wrongs.[12] In that light, the routine

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[12] Cf. United States v. Pueblo of Taos, 515 F.2d 1404, 1407 (Ct.Cl. 1975) (Pueblo Lands Board, established to adjudicate non-Indian claims to Pueblo lands, owed Pueblo a duty not to accept waiver or compromise of claims without

acceptance of the 1969 stipulation by the I.C.C. might well be seen as a severe wrong on the part of the Commission as against petitioner.

Regardless, however, given the existence in the I.C.C. file of the petition and the attorney contract, there can have been no presumption of any authority on the part of the claims attorneys to enter into the 1969 stipulation, or to argue thereafter for "taking" dates. Under the very "hornbook law" relied upon by the court below, those acts were completely void, and have no binding effect on

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12 (con't) taking "precautions that are appropriate in case of a claimant under guardianship;" Board's role viewed as comparable to that of the I.C.C.).

petitioner. For the court below to hold petitioner to these void acts of its attorneys effects a grave miscarriage of justice, solely in the name of expediency.

That same "hornbook law" also precludes any presumption of ratification of an act the principal lacked the power to authorize in the first instance. Restatement (Second) of Agency, §84(2). By virtue of the stringent protections enjoyed by Indian land under federal law, petitioner was legally incompetent to authorize its attorneys to surrender its title to its lands, absent explicit congressional sanction of such an act. Not even the passage of time can defeat this rigid requirement. Cf. Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927); Ewert v. Bluejacket, 259 U.S. 129 (1922) (where

original conveyance of Indian land was void, delay of seven years held not to bar right of Indians to set it aside).

The simple assumption by the court below that time, alone, can supply the power to alienate its lands that petitioner lacks under federal law, guts that protection altogether. This longstanding and lofty federal concern requires, once again, this Court's sympathetic attention.

CONCLUSION

For the foregoing reasons, and others asserted below, petitioner prays that this Court issue its writ of certiorari to the United States Court of Claims, and set this matter for plenary consideration.

Respectfully submitted,

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Appendix

81-1622

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PUEBLO OF SANTO DOMINGO,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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APPENDIX A

Opinion of the Court of Claims, dated
April 22, 1981

IN THE UNITED STATES COURT OF CLAIMS

Docket No. 355

(Decided April 22, 1981)

PUEBLO OF SANTO DOMINGO
v. THE UNITED STATES

Thomas E. Luebben, attorney of record, for plaintiff.
Jeffery S. Taylor and Luebben, Hughes & Kelly, of counsel.
D. Lee Stewart, with whom was Acting Assistant Attorney General Anthony C. Liotta, for defendant.

Before NICHOLS, KUNZIG and BENNETT, Judges.

ON PETITIONER'S OBJECTIONS TO THE ORDER OF THE TRIAL JUDGE PURSUANT TO RULE 13(C); PETITIONER'S MOTION TO VACATE OR MODIFY, ETC.; PETITIONER'S WITHDRAWAL FROM STIPULATION; DEFENDANT'S OBJECTIONS TO PETITIONER'S MOTION TO VACATE OR MODIFY, ETC.

KUNZIG, Judge, delivered the opinion of the court:

This is a petition originally filed with the Indian Claims Commission (ICC) in 1951 pursuant to the Indian Claims

Commission Act, 25 U.S.C. §§70 et seq. (1976). The petition alleged various trespasses by the Federal Government on petitioner's alleged tribal lands.[1] On October 29, 1969, attorneys for both sides filed a stipulation with ICC that the lands had in fact been taken and that the Government was liable for just compensation. This represented a significant change in the theory of the case. ICC thereafter determined the extent of the lands taken and the taking dates in a decision of May 9, 1973. 30 Ind. Cl. Comm. 234 (1973). This court then affirmed the holdings of ICC on this part of the case in an interlocutory appeal decided April 16, 1975. United States v. Pueblo of San Ildefonso, 206 Ct. Cl 649, 513 F.2d 1383 (1975). The case, along with many others,

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[1] Under the Indian Claims Commission Act, the ICC had jurisdiction over "claims in law or equity arising under the Constitution, laws, [and] treaties of the United States", "all other claims in law or equity, including those sounding in tort", and "claims arising from the taking by the United States...of lands owned or occupied by the claimant". 25 U.S.C. §70a (1976). The original petition herein sounded in tort. No taking had yet been alleged.

was transferred to this court in an incomplete state upon the expiration of ICC's statutory life in 1978. See 25 U.S.C. §70v (1976). No determination of the proper amount of compensation has yet been made.

This cause now comes before the court upon various motions and objections all of which center upon petitioner's request to withdraw from the stipulation of October 29, 1969. Petitioner contends that its then attorneys were not authorized to enter the stipulation and that, consequently, the stipulation should not be deemed to have binding effect. Our single response is that it is far too late in the day to make a motion of this nature.

The governing rules and principles are of the type we refer to as "hornbook law."

"An attorney employed for purposes of litigation has the general implied or apparent authority to enter into such stipulations or agreements, in connection with the conduct of the litigation, as appears to be necessary or expedient for the advancement of his client's interest or to accomplishment of the purpose for which the attorney was employed." 7A C.J.S.

Attorney and Client §205, at 341 (1980). "Such stipulations or agreements are binding on the client, without regard to the client's actual knowledge or consent." Id. at 341-342. "However, an attorney has no power to bind his client by an agreement or stipulation which he has not been expressly, impliedly, or apparently authorized to make." Id. at 342. "[U]nless he has been specifically authorized to do so [i.e., not merely impliedly or apparently], an attorney may not by stipulation or agreement, surrender any substantial rights of his client. . . ." Id.; see, e.g., Whitebird v. Eagle-Picher Company, 258 F.Supp. 308, 311 (N.D. Okla. 1966) (emphasis supplied). "[T]here is a strong rebuttable presumption that the acts of an attorney are within the scope of his employment, in the absence of a showing of the knowledge of the adverse party of restrictions thereon." Id., §172, at 258 (emphasis supplied). "There is a rebuttable presumption that an attorney has authority from his client to enter into a stipulation which may amount to a surrender of [his] client's rights, unless [the] adverse party as well as [the] court is aware that the attorney is acting in direct

opposition to his client's instructions." Id. at 259 n.84; accord, Pacific Tel. and Tel. Co. v. Fink, 296 P.2d 843, 847, 141 Cal.App. 2d 332 (1956). See also Navajo Tribe of Indians v. United States, 220 Ct. Cl.___, 601 F.2d 536, 539 (1979), cert. denied, 444 U.S. 1072 (1980).

Notwithstanding the foregoing limitations, "a client may be bound by a stipulation or agreement made by his attorney without express authority" where the client "fails to apply, seasonably, for relief from the stipulation." Id., §205, at 343 (emphasis supplied); accord, In re Estate of Moss, 248 N.E.2d 513, 516, 109 Ill. App. 2d 185 (1969) (unseasonable to attempt to withdraw from stipulation seven months after entry). The rationale presumably lies in the rule of agency that, "an affirmance of an unauthorized transaction can be inferred from a failure to repudiate it." REST. (SECOND) OF AGENCY §94 (1958). Petitioner's attempt herein to withdraw from a stipulation entered nearly twelve years ago falls egregiously outside the permissible range of delay.

It has been said that, "Stipulations are looked upon with favor by the courts,

since they tend to promote disposition of cases, simplification of issues and the saving of expense to litigants. The ends of justice are furthered by stipulations of settlement and the reluctance of courts to vitiate such agreements is founded in fundamental logic" Moss' Estate, 248 N.E. 2d at 516.

Procedurally, the pending motions are governed by Rule 152(b) of this court's rules of procedure. See also FED. R. CIV. P. 60(b). Rule 152(b) commands that the motion shall be made within a "reasonable time". We have stated that the Rule requires "diligence" upon the part of the moving party. Andrade v. United States, 202 Ct.Cl. 988, 996, 485 F.2d 660, 664 (1973), cert. denied sub nom. Pitt River Tribe v. United States, 419 U.S. 831 (1974). Again, the conclusion is unavoidable that petitioner has tarried far too long. Time is now especially of the essence since Congress has expressed its desire that the special Indian claims litigation be wound up by having terminated the operations of the ICC in 1978.

All other arguments raised by petitioner, although not directly addressed in this opinion have been considered and

found to be without merit.

Accordingly, after consideration of the submissions of the parties, without oral argument of counsel, all of petitioner's interrelated motions and objections are denied. Defendant's objections are sustained. The case will go forward in the trial division in accordance with the stipulation of October 29, 1969, the ICC decision of May 9, 1973, and this court's affirming opinion of April 16, 1975.

NICHOLS, Judge, dissenting:

The court is denying the motions without oral argument or receipt of any testimony. I dissent, respectfully, because I do not think we should make a decision on the grounds given without the facts we do not have and which a trial judge could provide. I favor a remand to obtain those facts. The panel has such a useful set of assumptions it does not need facts.

The Indians, through new counsel, want to withdraw from a stipulation made for them in 1969 by former counsel, that specifies that the United States took (at an unstipulated date) the tracts involved

in this litigation. They would revert to the theory stated in their original petition that defendant committed trespasses on their land but did not take it. After the stipulation the Commission, using the stipulation as a basis, determined the taking dates of the various tracts. This court affirmed in United States v. Pueblo San Ildefonso, [et al.], 206 Ct.Cl. 649, 513 F.2d 1383 (1975). In that case, the government appeal presented issues as to the date or dates of taking applicable to the several tracts in litigation, but our panel did not have before it or consider whether any tract or tracts might in truth not have been taken at all.

That appeal was on an interlocutory order under 25 U.S.C. §70s and no judgment was entered as a result of the affirmance, nor has there been one since. I assume, however, the decision is "law of the case" under Turtle Mountain Band v. United States, 222 Ct.Cl. ___, 612 F.2d 517 (1979) and Northern Helex Co. v. United States, 225 Ct.Cl. ___, 634 F.2d 557 (1980). The Indians may therefore reopen only if they can persuade the court that the decision "was clearly erroneous and works a manifest injustice." They say

that they always wanted to limit claims to a trespass theory where possible and that their original counsel drafted the petition on that theory, yet in stipulating disregarded their express instructions. It is a seeming fact that many tribes have only belatedly recognized the pecuniary advantages of restricting their Indian Claims Commission taking claims to instances where a prior title extinguishment was unquestionable, whereas claimants in the earlier years of operations under the 1946 Act tended to try to maximize the extent of takings to maximize the case thereby to be realized. This change threatens the early completion of our tasks under the Indian Claims Commission Act, 25 U.S.C. §70 and ff, and I share the panel's irritation towards it. But really belated changes in the thrust of the litigation are objectionable on equitable grounds which do not apply with equal force if that is what the tribe wanted all along. This distinction the panel cavalierly ignores. A mere self-serving statement of what Indians now say they always wanted would not be entitled to much weight, but here they proffer the original text of the petition and would show their

original instructions to counsel and they may have a prima facie case. I would not take any of this on faith. I would permit the tribe to withdraw the stipulation and vacate the vol. 206 decision only on clear and convincing evidence that their original position was as alleged, that they communicated it to counsel in his instructions, that he violated the instructions without notice to them, and that they took timely action when they learned what he had done.

The Indians charge serious misconduct and conflict of interest on the part of their former counsel. Misconduct on the part of its trial bar is always a proper concern of a court and this is doubly true in the case of Indian litigants who are supposed to lack the capability to protect or perhaps even perceive their own interests vis-a-vis their counsel, and to monitor him where a conflict exists. The panel is not interested in finding out whether misconduct occurred. Presumably it knows by superrational intuition that the charges are unfounded. It is true that such charges have been a commonplace accompaniment of efforts to change the thrust of a tribal claim. Our Indian litigation bar is or perhaps was made up of upright

persons and we have to make every reasonable presumption in their favor when misconduct charges lack specifics and are simply part of the thunder and lightning coming with a change of front. Doubtless we must look for substantiation and specificity before we even investigate.

Unfortunately the machinery of the Indian Claims Commission Act is such as to generate conflicts of interest. One of many such situations is the one asserted here, i.e., the attorney's interest, but not the tribe's is to effect a judicial sale, as it were, of tribal land at values of some historic past date, not of the present, to be set by the Commission, whether or not the Indians may in reality ever have had their title extinguished except by the ICC proceeding itself. One prediction I make with confidence, is that attorneys' conflicts of interests and the measures required to cope with them will loom larger in future litigation than they have in the past. I note that only recently the Supreme Court has refused to consider an equal protection issue in a case it had accepted by certiorari, and remanded, because it perceived sua sponte,

a conflict of interest between counsel and clients. It was a criminal case, counsel was paid by the defendant's employers, and the Court believed he may have been guided in litigation strategy by the employer's interest. Wood v. Georgia, 49 U.S.L.W. 4218 (U.S., March 4, 1981). One conflict long tacitly ignored in ICC cases is that the counsel's interest on the usual contingent fee basis turns only on the amount of award to be extracted from defendant; yet the tribe's interest is not only in the amount of the award, but also in minimizing what land title or claim thereto it has to give up, which may be substantial. Thus for example, a million dollar award may be better for counsel, but worse for the tribe, compared to a half million, if the former operates to extinguish Indian title to substantial tracts by virtue of 25 U.S.C. §70u, while the latter does not. If the tribe thereby retains title to lands worth $500,000 or more, it gains by the smaller award. The Supreme Court in United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941), sets forth the canon that received general lip service in ICC cases, that any alleged extinguishment of Indian title not the result of express congressional action

"cannot be lightly implied". This was not always easy to implement where the Indians were expelled de facto but not de jure, and instances have occurred where awards were made and title extinguished by judgment where there was no expulsion even de facto. The tendency was to think if the Indians were alleging a tract was taken, no harm could follow from accepting their view. The right kind of Indian counsel are well aware of this kind of problem and are exceedingly careful their clients know of everything done, and have given well informed consent. I think Indians who allege attorney misconduct of this kind are entitled to have the fact at least mentioned in the decision throwing them out of court, are entitled to a hearing if they display a moderate amount of corroboration, and are entitled to corrective action, the law of the case rule notwithstanding, if they establish by clear and convincing evidence the misconduct actually occurred.

There is a remarkable parallel between the facts of this case and the instance in 1957 when new counsel saved the famous Sioux claim for the Black Hills taking when it was gasping on the ropes.

On November 7, 1956, this court published a decision, Sioux Tribe of Indians v. United States, 146 F.Supp 229, which affirmed an ICC decision denying the Black Hills claim, with others, in toto. The opinion was by Judge Laramore, and all the other judges concurred. Counsel for the Sioux was Ralph H. Case, soon after deceased. Under date of October 4, 1957, i.e., almost a year later, new counsel filed a motion for rehearing to vacate the November 7, 1956, affirmance, and to remand to the ICC for a full and complete hearing and disposition on the merits. The motion relied on allegedly incompetent legal representation by Mr. Case, resulting in the tribal claims being determined on the basis of a distorted and empty record. Specifically, they said Mr. Case, unknown to his clients-

(a) advised government counsel in secret he would drop certain claims,

(b) presented the claims that remained on an erroneous and untenable legal theory.

(c) urged a standard for measuring damages which the courts have always rejected,

(d) volunteered concessions contrary to fact,

(e) failed to conduct research, and

(f) did not prepare properly for trial.

The motion also faulted the ICC for not using its own investigative resources which, the movants said, were created in anticipation that the adversary system would not always protect the Indians. The movants said that in hearing the appeal, this court must have perceived that the Sioux were not competently represented.

The government opposition stated that the tribe continued Mr. Case as counsel after it could not but have observed his conduct at the trial, and for two years after the ensuing adverse ICC decision of April 5, 1954; the first expression of dissatisfaction by the tribe was almost a month after this court's decision of Novmeber 7, 1956. The government brief in opposition also cited a long array of decisions of this court in which defendant was not allowed to reopen cases lost because of the kind of counsel's error imputed to Mr. Case.

It is easy to see what our present panel, with its incantation of "hornbook law," would have done with new counsel's egregious set of allegations and assertions, and how overwhelming it would have consid-

ered the government response to be.

This court as then constituted cannot be accused of reacting in haste or irritation. It withdrew its decision, though only after it had been published in F.Supp., where it still may be read as an interesting relic. On November 5, 1958, it vacated its decision and remanded the case.

The order, signed by Chief Judge Marvin Jones, shows that the court did not undertake itself to pass on the sufficiency of the reasons assigned in the motion. The new counsel were not required to, and did not, supply affidavits or other documents in support. The order reads that the motion to vacate the judgment and to remand the case is granted to the extent the case is remanded for "a determination by the said Commission as to (1) whether the claimant Indians are entitled on the basis of statements made in support of the above motions to have the proof in this case reopened, and (2) if so, to receive the additional proof and * * * reconsider its prior decision in this matter." That is in essence the procedure I proposed here, that the panel rejected, i.e., that our trier of fact should, subject of course to our

review, pass on the sufficiency of statements made in support of the motion or motions.

The 1958 order was unpublished and apparently there was public confusion what had happened to the case, though counsel knew it was back at the ICC. By a "summary of proceedings," 182 Ct.Cl.912 (1968), we published a notice of what we had done 10 years before and where the case was. While this court did not spell out its reasons, it would appear by its actions to have taken into account the implicit major premise of the motion: that in the case of Indian litigants the ICC and this court were required not to visit on Indians the consequences of defective representation or attorney misconduct, which under the normal operation of the adversary system would be fatal to a claim. It was not necessary to spell this out to the judges of that day. This factor the panel here has wholly failed to take into account. There is somewhat of a presumption that Indian claimants are not competent to look after their own interests and the court must look after them. If the Pueblo of Santo Domingo is different, the panel has done nothing to

establish the fact.

The Indians undertook to explain why they waited from 1969 to 1980 to complain about the stipulation. The panel by ignoring the explanation presumably holds it is inadequate, the function we assigned to the trier of fact in the Sioux case. I would have cautioned the Indians to make their explanation a good one. The panel rightly says that the motions are under our Rule 152 and the applicable standard in passing on such a motion is whether the party seeking relief has acted within a reasonable time, and that "diligence is required." Andrade v. United States, 202 Ct.Cl. 988, 996, 485 F.2d 660, 664 (1973), cert. denied sub nom., Pitt River v. United States, 419 U.S. 831 (1974). That case involved a compromise settlement the ICC approved, but which dissident Indians wished to attack. They had attacked it before the ICC. They wanted an appellate review of the approval decision before this court but they were inordinately dilatory in asking for it. We viewed the petition as an "independent action" under the last part of Rule 152(b), the only possible way we could have jurisdiction at all. We did not need any fact finder to pass on the

motion because we had the full fact findings of the ICC. We knew the dissidents had alleged to the ICC, years earlier, the same acts of attorney misconduct they charged here. Thus we needed no further fact finding. The case is certainly not authority, as it is used, for erecting a kind of irrebuttable presumption that a lapse of time, 11 years or any other, is so excessive that no fact finding is necessary and no explanation will be listened to.

I suppose I will be charged with being soft on Indian claims and with wishing to prolong Indian litigation. Neither is my intention. The panel refers to the desire of the Congress that the Indian claims litigation be wound up. The Congress also desired that all litigable pre-1946 claims be disposed of under the 1946 Act, so it would not have to deal again with the importunities of Indian claimants, as before 1946 it had to do. If the panel decision stands, the Indians may, if they are sincere, decide to forgo the valuation phase of the case and allow their petition to be dismissed. The court cannot prevent their making that election, though it can dismiss with prejudice. We all know

that a dismissal with prejudice means little in Indian litigation. Indians, like the Sioux, lose with prejudice over and over again, and still they return. When the Indians are back on the doorstep of Congress demanding further legislative relief, Congress may want to know why the ICC and ourselves have not heard the importunities of the Indians, found the facts, and decided what relief is appropriate on the basis of facts, not arbitrary irrebuttable presumptions. Thus I predict that the panel may well prolong Indian litigation more than my solution would have done. Frankly, I think it unlikely that pre-1946 Indian claims will be finally laid to rest in the lifetime of any present members of the court, say nothing of new ones coming along. The 1946 Act was not very successful as an appeaser of Indian discontent, or as a solution to their social problems, but as a breeder of costly and prolonged litigation, it has been a triumph beyond anyone's fondest hopes. I think the panel and I might allow one another credit for both desiring to lay this hydra-headed monster in its grave as soon as it can decently and lawfully be done. It is

easier to start something like this than stop it, however. In this instance, I respectfully differ with the panel as to the means.

What we have here is a decision possibly within the court's discretionary power, for the guidelines on exercise of Rule 152 authority are few and not specific. Still the decision in its unwisdom is "an exercise of raw judicial power" in the deathless words of Justice White, dissenting in Roe v. Wade, 410 U.S. 113, 222 (1973). I emphasize the word "raw." To end with another quote, the prophet Job lamented: "Would that mine enemy had written a book." This court, like other courts, is not entirely without enemies, and I do not know anything we could say or do that would give them more satisfaction than the panel opinion herein.

APPENDIX B

Order of the Court of Claims Denying Rehearing, entered October 2, 1981

IN THE UNITED STATES COURT OF CLAIMS

No. 355

PUEBLO OF SANTO DOMINGO

v.

THE UNITED STATES

Before NICHOLS, KUNZIG and BENNETT, Judges.*

October 2, 1981

ORDER

PER CURIAM. This case comes before the court on plaintiff's motion, filed June 22, 1981, for rehearing en banc pursuant to Rules 7(d) and 151(b), with reference to the decision entered herein on April 22, 1981. Upon consideration thereof, together with the response in opposition thereto, by the seven active Judges of the court as to the suggestion for rehearing en banc under Rule 7(d), which suggestion is denied#, and

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* Judge Nichols would allow plaintiff's suggestion for rehearing en banc and motion for rehearing.

Judge Davis, in voting against rehearing en banc, is of the view that the plaintiff's

further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing is denied.

(cont.) own voluminous affidavits and papers show that there was most probably no misconduct or concealment by their prior attorneys, that the Indians were aware of the attorneys' position and of the decisions of the Indian Claims Commission (in 1973) and this court (in 1975), and that the long delay until the filing of the motion to vacate in 1980 could reasonably be considered by the panel majority to be too long in the circumstances.

APPENDIX C

Petition, Pueblo of Santo Domingo v. United States, Docket No. 355 before the Indian Claims Commission, dated August 11, 1951

Docket No. ___

Before the

Indian Claims Commission of the
United States

THE PUEBLO OF SANTO DOMINGO, Petitioner

vs.

THE UNITED STATES OF AMERICA,
Defendant

PETITION

Jurisdiction

1. Tribal Existence. The Pueblo of Santo Domingo, also known as the Pueblo de Santo Domingo, is and has been since time immemorial a tribe of American Indians residing within the present territorial limits of the United States.

2. Tribal Organization. Petitioner has been recognized by the Government of the United States as a tribe and as a corporation, having a regularly elected Governor and Council to represent it. Such recognition is evidenced by a cane in

the possession of the present Governor of the Pueblo, granted to Petitioner by President Abraham Lincoln. Petitioner was similarly recognized by the Government of Mexico, as evidenced by a similar cane in the possession of the present Governor, and was also similarly recognized by the Government of Spain, as evidenced by a cane granted by the sovereign of Spain, and now in the possession of the present Governor of the Petitioner. Petitioner is authorized under the laws of New Mexico to sue and be sued as a corporation. This action is instituted by and under the direction of the Petitioner acting through its Governor and Council. Petitioner has acted from time immemorial in accordance with unwritten customs of Pueblo Indian Government of long standing.

No group of individuals or tribal organizations other than that set forth in the preceding paragraph is recognized by any department, office, or other agency of the United States Government as having authority to represent, or act in the name of, the Petitioner, on the matters covered by this petition.

3. Employment of Counsel. Petitioner is represented in this proceeding by its attorney, Darwin P. Kingsley, Jr., 122 East 42nd Street, New York City 17, N. Y., according to the terms of a written contract of employment duly executed on behalf of the Petitioner on August 1, 1951, and filed with the Commissioner of Indian Affairs on August 2, 1951.

4. Statutory Authority. Petitioner files the claim asserted herein pursuant to the Act of Congress of August 13, 1946 (60 Stat. 1049, 25 U.S.C. 70, et seq.), hereinafter sometimes referred to as the "Act."

5. Exclusiveness of Forum. The claim presented herein accrued prior to August 13, 1946. No suit is pending in the Court of Claims or the Supreme Court of the United States with respect to said claim, nor has said claim been filed in the Court of Claims under legislation existing at, or prior to, the date of the approval of said Act.

6. Nature of Claim. This claim is based upon Defendant's violation of various promises, treaty commitments,

and other obligations, under law and equity and under standards of fair and honorable dealings established by the Act, by which Defendant was bound to protect valuable rights which Petitioner enjoyed at the time when it first came under the sovereignty of Defendant. Among these valuable rights were the right to unimpaired use of water, grazing lands, timber lands, and other lands which had been used from time immemorial, and the right to enjoy all opportunities and privileges available to white citizens. As a result of various violations of these rights by Defendant and its agents, Petitioner has been deprived of certain lands which it once owned in full title, and has also lost the use, rentals, and profits, for substantial periods of time, with respect to other lands in which it had legally protected rights under Spanish and Mexican sovereignty. This suit is brought to secure compensation for the various losses so suffered.

Petitioner does not intend by any assertion in this complaint to concede that its rights have been terminated as to any particular tract used, claimed,

or possessed by it when such lands first came under the jurisdiction of Defendant. Petitioner is informed and believes, and on such information and belief, asserts the fact to be, that by far the greater part of such land, outside of the original Santo Domingo Pueblo Grant, is still held by Defendant and that no third parties have any valid vested rights therein. As to all such lands upon which no valid grant to any third party has ever been made, Petitioner does not claim that such land has been taken by Defendant or that Defendant is bound to pay just compensation as for such a taking of land, but on the contrary, Petitioner claims only compensatory damages for such interference with its exclusive use of such land as shall be proven to have taken place prior to the entry of judgment herein.

Extent and Nature of Petitioner's Land Rights

7. Location of Petitioner's Lands. The lands now exclusively occupied and possessed by Petitioner lie generally within a tract commonly known as the Santo Domingo Grant, shown as Area No. 669 on

the Map in Royce's Land Cessions, bearing the caption "New Mexico 1." This land was within the exclusive occupancy and possession of Petitioner at the time when such lands came under the sovereignty of the United States. In addition to these lands, Petitioner at that time, and for many centuries prior thereto, exclusively used and occupied certain additional lands adjacent to the said areas, from which Petitioner has since been excluded.

8. Character and Use Made of Petitioner's Lands. Shortly after the assertion of United States sovereignty over the lands of Petitioner, the Supreme Court of New Mexico, consisting of judges appointed by the President, with the advice and consent of the Senate, characterized the members of Petitioner as "a people living for three centuries in fenced abodes and cultivating the soil for the maintenance of themselves and families, and giving an example of virtue, honesty and industry to their more civilized neighbors." The materials upon which Santo Domingo Indians exercised their industry came from the lands in their possession. These lands lie at

an altitude varying from 5200 feet to 6500 feet above sea-level. The maximum frost-free growing season within this area does not exceed 100 days a year. During that portion of the year the members of Petitioner have for many centuries past directed their chief labors to the work of irrigation farming. The permanent homes, irrigation works, and public buildings of Petitioner and its members are located within, or immediately adjacent to, the areas irrigated from the Rio Galisteo and the Rio Grande. During the greater part of the year, when climatic conditions preclude agricultural occupations, Petitioner and its members did not limit their occupancy of land to the village area in which their homes, buildings and irrigation works were located, but utilized certain definite areas adjacent and contiguous thereto. At the time when Defendant assumed sovereignty over the area, Petitioner was raising large herds of horses, mules, sheep, and goats, utilizing for such purposes grazing lands outside of the village area. Petitioner had used such lands for grazing since the introduction of livestock by

Spanish priests and explorers in the sixteenth and seventeenth centuries. Throughout that period and for many centuries prior thereto Petitioner also made regular and exclusive use of other defined areas outside the village area for purposes of hunting, trapping and fishing, cutting wood for construction and fuel, securing salt, clay, flint, and various other mineral products, collecting pinon nuts, medicinal herbs, dyestuffs, materials for basketry, materials for making soaps, clothing, ornaments and comestics, edible roots and berries, and other mineral and vegetable products.

9. Character of Possessory Rights under Prior Sovereigns. Within the areas referred to in the preceding paragraph, Petitioner openly and notoriously claimed exclusive possessory rights, and enjoyed sole and undisputed use, occupancy and possession at the time when such lands first came under the jurisdiction of Defendant, and had similarly claimed and enjoyed such rights throughout the period of Spanish and Mexican sovereignty and long prior thereto. At all such times these rights had been recognized by the

neighboring Indian Pueblos, the adjacent Pueblo of Cochiti on the North, the neighboring Pueblo of San Felipe on the South, and the neighboring Pueblo of Jemez on the West, and the neighboring Pueblo of Zia on the Southwest, and by other Indian Pueblos of the Rio Grande Valley.

10. Protection by Spanish and Mexican Law. The foregoing possessory rights were protected by the Government of Spain and by the Government of Mexico as to all or substantially all of the areas used and occupied by the Petitioner. The Spanish Laws of the Indies, which continued to be the law under Mexican sovereignty, prohibited any grant of lands which might be prejudicial to the use and occupancy rights of the original Indian inhabitants (Recopilacion de Indias, Book 4, Title 12, Law 9). These laws recognized "immemorial custom" as entitling the Indian occupants of land to protection (Novisima Recopilacion, Book 10, Title 17, Law 1); guaranteed to Indians who consented to live in Pueblos that their traditional possessions away from the Pueblos would continue to be recognized and pro-

tected (Recopilacion de Indias, Book 6, Title 3, Law 9); required the removal of any non-Indian ranches which operated to the prejudice of the Indians (Recopilacion de Indias, Book 4, Title 12, Law 9 and Instructions to Viceroys, 1596, ch. 21); required the King's attorney to appear on behalf of the Indians for the protection of their land rights in all cases where such land rights might be affected (Recopilacion de Indias, Book 2, Title 18, Law 36); and provided for the designation of a special attorney for the Indians by the court wherever Indian rights adverse to the Crown might be involved. (Ibid., Law 35, approved February 13, 1554). The principle that the Indian Pueblos had possessory rights not only within the areas which they actually occupied, but also within the areas which they utilized, continued to be recognized and implemented throughout the period of Spanish authority, and subsequently was reaffirmed by the Mexican Government. Under Mexican rule the Plan of Iguala of February 24, 1981, incorporated into the Mexican Declaration of Independence of October 16, 1821, further declared that "all inhabitants of New Spain, without

distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, . . ." and also that "the person and property of every citizen will be respected and protected by the Government."

11. Confirmation of Pueblo Grant. Petitioner's ownership of the area referred to in paragraph 7 was confirmed by an ancient Spanish grant or confirmation.

12. Water Rights. Under the laws of Spain and Mexico, and under the custom of the Indian Pueblos long prior to the coming of the Spaniards, Petitioner was entitled to use the waters on which it depended for its irrigation works without interference from any human source. During the period of Spanish and Mexican dominion, Petitioner's rights in this regard were protected by general laws and decrees and, upon information and belief, were not made the subject of any specific grant or decree.

13. Rights of User. At all times the Spanish and Mexican Governments recognized and protected Petitioner's rights to uninterrupted and exclusive use of those areas which had been regularly

and exclusively used by Petitioner for many decades for grazing purposes and, from time immemorial, for other purposes set forth in paragraph 8. Such rights of user were generally regarded under Spanish and Mexican law as "imperfect rights," which would terminate when no longer utilized, whereas the Pueblo land grant to the village area was considered a "perfect right" capable of alienation under prescribed conditions. To the Indians this distinction was of no importance, since they had no intention of either alienating their homes or abandoning any of the lands on which their subsistence depended.

Obligations Assumed by Defendant

14. Treaty. Petitioner first came under the political jurisdiction and protection of the United States on or about August 18, 1846, when General Kearny, after taking possession of New Mexico, established a system of civil government in that territory. This assumption of sovereignty was subsequently ratified by the Treaty of Guadalupe Hidalgo of February 2, 1848 (9 Stat. 922), with the Republic of Mexico. In said

treaty, Defendant, ratifying the policies regarding land tenure adopted by the previous sovereigns, specifically promised inhabitants of the former Mexican territory, including the Petitioner, "free enjoyment of their liberty and property." To the members of Petitioner an important part of this promised liberty was the liberty to graze their livestock, to resort to usual and accustomed hunting and trapping grounds and quarries, and to secure materials needed for subsistence and for industry. Likewise to the members of Petitioner, an important part of the promised "enjoyment of property" related to land used for the foregoing purposes, notwithstanding that under the theory of Spanish law, Petitioner's property rights in such lands were denominated "imperfect" rather than "perfect."

15. Promises by Calhoun and Others. During the years following August 18, 1846, the military and civil representatives of the United States in charge of the Territory of New Mexico repeatedly promised Petitioner that, under the dominion of the United States, its use

and possession of lands and water would forever be protected and safeguarded against trespass, interference or alienation. Among such promises was that contained in an agreement executed by James S. Calhoun, acting as Commissioner on the part of the United States, on July 7, 1850, and on July 9, 1850, by the governor of the Petitioner and his two advisers, or "Principales", providing, inter alia, as follows:

> 4. The Government of the United States . . . will adjust and settle, in the most practicable manner, the boundaries of each Pueblo, which shall never be diminished, but may be enlarged whenever the Government of the United States shall deem it advisable.

In consideration of these and other promises on the part of the United States, the Pueblo of Santo Domingo placed itself "under the exclusive jurisdiction and protection of the Government of the United States," surrendered the right to use force to protect its lands, its waters, and the interests of all inhabitants, and agreed that "all cases of aggression against the persons and interests of their respective Pueblos shall

be referred, for adjustment and settlement, to such tribunals as the Government of the United States has provided or may provide."

16. Finality of Agreement. Neither the promises of the United States in the aforesaid agreement nor those of the Pueblo of Santo Domingo were made dependent upon any further action by the Senate or President of the United States, or by any other person or body. James S. Calhoun, in executing the aforesaid agreement, represented the United States by virtue of an appointment by the President made with the advice and consent of the Senate, and acted pursuant to instructions from the Commissioner of Indian Affairs, dated April 24, 1850. Petitioner understood that the promises made in the Agreement of July 9, 1850 were the solemn promises of the United States. Petitioner understood that it was bound by the reciprocal promises which it had given, and thereafter faithfully adhered to those promises. Petitioner does not know of any advice or notice ever issued by Defendant to the effect that such agreement is invalid or has ever been revoked or re-

scinded, and if any such notice or advice has been issued and is known to Defendant, Petitioner hereby demands that such records be produced and presented to this Commission for Petitioner's inspection.

17. Assumption of Guardianship. Following the submission of Petitioner to "the exclusive jurisdiction and protection of the Government of the United States," as provided in the Calhoun Agreement of July 9, 1850, Defendant assumed to exercise guardianship and control over the lands, water rights, funds and other property of Petitioner.

18. Extension of Indian Trade and Intercourse Laws. By Section 17 of the Act of September 9, 1850 (9 Stat. 446, 452) and by Section 7 of the Act of February 27, 1851 (9 Stat. 574, 587), Defendant extended to the Territory of New Mexico the laws prohibiting trespass or settlement upon Indian lands and controlling the alienation of such lands and other laws protecting the property and other rights of Indians.

19. Survey and Protection of Pueblo Land Claims. By act of July 22, 1854 (10 Stat. 308), Congress authorized

the President to appoint a Surveyor General who, under the instructions of the Secretary of the Interior, was "to ascertain the origin, nature, character, and extent of all claims to land under the laws, usages, and customs of Spain and Mexico" and was to make a full report on:

> all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land . . . and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this Act.

Violation of Defendant's Promises

20. General Statement. Notwithstanding the foregoing acts of Defendant recognizing Petitioner's rights and promising their protection, agents of Defendant charged with such protection by various acts of misfeasance, malfeasance and nonfeasance, violated such promises and failed adequately to carry out the duties and trusts reposed in them, with respect to the protection of Petitioner's rights in land and water, in ways hereinafter set forth, and, as a result, such rights have been impaired, and, in some instances, lost.

21. Failure of Surveyor General to Complete Study. Notwithstanding the obligations laid upon the Surveyor General and the Secretary of the Interior to make a full report on the various claims of Petitioner and the "various grades of title" involved in such claims, the Surveyor General reported only on the original Spanish grant to the Petitioner, and did not report on other claims of Petitioner, and never afforded Petitioner an opportunity to present such other claims.

22. Confirmation of Original Grant. With respect to the original Spanish grant to Petitioner, the Surveyor General found the grant valid and in his report of September 30, 1856 recommended its approval. The said grant was thereafter confirmed by Congress in the Act of December 22, 1858 (11 Stat. 374). A patent for the said land was duly issued to Petitioner on November 1, 1864. The area of land described in the confirmed Spanish grant amounted to not less than 92,598.382 acres of land. Such was found to be the acreage on a resurvey of the land made in 1907 and approved by the General Land Office in 1909.

23. Error in Marking Boundary. Agents of the Defendant, in marking the boundaries of the original Spanish grant, failed to locate properly the northeast corner described in the said grant. At least 17,665.272 acres covered by the original Spanish grant were therefore left outside the Pueblo boundary line under the original survey approved October 19, 1862.

24. Conflicting Grants. As a consequence of this mistake, grants were later confirmed to third parties without

notice to Petitioner and, upon information and belief, without knowledge on the part of the Defendant that lands previously granted and confirmed to Petitioner were covered by such confirmations to third parties. Such grants included the La Majada grant confirmed by the Court of Private Land Claims on September 20, 1894, in Case No. 89, and the Mesita de Juana Lopez grant confirmed by Act of Congress dated January 28, 1879 (20 Stat. 592).

25. Failure to Protect "Imperfect Rights." (a) Although Defendant attempted to protect the so-called "perfect property rights" of Petitioner in the lands referred to in Paragraph 7, by act of Congress dated December 22, 1858 (11 Stat. 374) confirming the said grant, and by a patent issued pursuant to such act in 1864, and although it offered Petitioner at least a theoretic opportunity to establish other similar grants before the Court of Private Claims set up by the Act of March 3, 1891 (26 Stat. 854), Defendant failed to provide any judicial or administrative tribunal, prior to August 13, 1946, wherein there might be adjudi-

cated either the extent and character of "imperfect property rights" or "inchoate claims," or the extent of damages caused to Petitioner by the failure of Defendant to protect such rights against third parties and to respect such rights in its own disposition of lands and waters.

(b) Although the Supreme Court of the United States in 1897 (in the case of United States v. Santa Fe, 165 U.S. 675) determined that "the duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial departments of the Government" (at p. 714), Defendant did not, prior to August 13, 1946, authorize the political arm of the Government to adjudicate, generally, controversies relating to such rights.

(c) Other areas in which Petitioner enjoyed exclusive rights of user from time immemorial have been taken or utilized by Defendant and by persons claiming rights by and through Defendant without consent of Petitioner.

26. Failure to Protect Rights Within Pueblo Grant. Notwithstanding the promises made by Defendant in the Treaty of Guadalupe Hidalgo and the Calhoun Agreement of July 9, 1850, and on numerous other occasions, and the obligations otherwise assumed by Defendant with respect to protection of Petitioner's property, Defendant failed to protect lands of the Petitioner, both within and outside of the confirmed Santo Domingo Grant, from trespass, unlawful alienation, seizure under color of invalid statutes, and other forms of dispossession except as to those cases of trespass and illegal alienation that fell within the limited jurisdiction of the Pueblo Lands Board under the Act of June 7, 1924 (43 Stat. 636). Following the dissolution of the Pueblo Lands Board, Defendant again permitted third parties to take over, or trespass upon, lands to which Petitioner holds title.

27. Failure to Protect Water Rights. Notwithstanding its obligations to protect Petitioner in its water rights, Defendant allowed such rights to be impaired by giving its sanction to the diversion of waters of the Rio Galisteo

and of the Rio Grande, which Petitioner had used from time immemorial, and by permitting and authorizing the drilling of wells by third parties at various points where such action resulted in lowering the water-table on the lands remaining in the possession of Petitioner, and thus reducing the productivity of such lands. Defendant further permitted third parties to graze livestock upon the watersheds controlling the water supply of Petitioner, in such numbers and in such fashion as to cause acute erosion and to interfere with the regular water supply of Petitioner for irrigation purposes.

28. Prevention of Self-Help. In assuming to act as guardian of Petitioner's interests, Defendant not only prohibited Petitioner from exercising self-help in the protection of its lands and waters, but also denied to Petitioner recourse to the political agencies of government available to Petitioner's non-Indian neighbors. Thus, on February 16, 1854, an agent of the Defendant, to wit, the Governor of the Territory of New Mexico, approved an act of the legislature of that Territory, declaring that the

Pueblo Indians "until they shall be declared by the congress of the United States to have the right, are excluded from the privilege of voting at the popular elections of the territory, except in the elections for overseers of ditches to which they belong, and in the elections proper to their own pueblos to elect their officers according to their ancient customs." Congress failed to take action to establish their right to vote, and until the decision of a special Federal Court on August 2, 1948, members of the Petitioner were denied the right to vote in Federal, Territorial, State, County, and City elections within the Territory and State of New Mexico. As a result, Petitioner and its members were unable to protect their property rights through measures of Congressional, Territorial, or State legislation and through other measures available to their voting neighbors. Petitioner and its members were likewise deprived, by act of Congress on March 3, 1871, and by various later acts, of the privilege of being represented by attorneys of their own choosing in the defense of their land

rights, and were at the same time deprived of the opportunity to contract for other services with respect to their lands. Through these measures Petitioner's hands were effectively tied so that Petitioner was unable to act on its own behalf to secure and protect its property rights and the property rights of its members.

29. Negligence and Procrastination. Those obligations of Defendant to Petitioner which were carried out were carried out only after long and inexcusable delays, as a result of which Petitioner was deprived of normal facilities for the protection of its own rights. Among such delays were the following:

(a) Although denying Petitioner the right to be represented by attorneys of its own choosing after 1871, Defendant did not, until 1899, designate a Government attorney to represent Petitioner and other Pueblos, and the activity of this attorney was limited to Pueblo litigation with third parties, and did not extend to Defendant, as to which they continued to be without the rights of representation enjoyed by non-Indians.

(b) Furthermore, although schools had been maintained under Spanish dominion for the benefit of Petitioner and its children, and a reasonable degree of literacy in the Spanish language had been attained, Defendant did not, prior to 1870, make any provision for the education of Petitioner and its children, but on the contrary, by denying them the franchise, encouraged territorial and local authorities to deny free public education to members of the Petitioner and to other Indians.

(c) From 1846 until 1905 threats of taxation were commonly used to persuade or coerce Petitioner and its members to make allegedly voluntary cessions of land within the Santo Domingo Grant, but not until the Act of March 3, 1905 (33 Stat. 1048) did Congress act to confirm the tax-exempt status of such lands.

30. Failure to Publish Agreement. Defendant, although authorizing execution of the agreement referred to in paragraph 15, and although it well knew that Petitioner regarded such agreement as a solemn pledge on the part of the United States and was acting in reliance

upon that agreement, failed, for 65 years, to publish the agreement, failed ever to submit the agreement for ratification by the Senate of the United States, failed to act to carry out the agreement, and until 1915 failed to bring this agreement to the attention of officials and agents of Defendant charged with matters covered by this agreement.

31. Denial of Rights of Citizenship and Protection of Wardship. When rights of citizens were at stake agents of Defendant considered the members of Petitioner to be non-citizens and they were thus denied rights of franchise until 1948, and were also denied ordinary rights under the public land laws, at least until 1924. On the other hand, when rights generally available to non-citizen Indians were at issue, such as rights to protection under the Indian Trade and Intercourse Laws, rights to recognition of hunting territories, and the right to make treaties and to receive annuities, the Pueblo Indians were viewed by agents of Defendant as citizens, and therefore denied such protection. Thus, although treaties were made with Petitioner's western neighbors, the Navajo Indians, and with

their eastern neighbors, the Apache Indians, by which Indian rights in extensive areas of hunting ground were preserved, and compensation was paid to the tribes for various land cessions, no such treaties were ever made with Petitioner, and Petitioner never received any annuities or treaty payments such as were disbursed to Petitioner's Navajo and Apache neighbors. Similarly, although the benefits of the Indian Trade and Intercourse Laws were extended to the Territory of New Mexico by the legislation of 1850 and 1851 referred to in paragraph 18, agents of Defendant took the position that the Pueblo Indians were not Indians, and were therefore not entitled to the protection of those laws. This mistake was not corrected until 1913, when the Supreme Court in the case of United States v. Sandoval, 231 U.S. 28, held that the Pueblo Indians were Indians and were entitled to all the protection of the Indian Trade and Intercourse Laws. During the period from 1850 to 1913 Petitioner and its members were unjustly deprived of such protection. The delays and procrastinations of the

Defendant in according the promised protection resulted in substantial losses to Petitioner.

32. Duty to Account. Defendant, having exercised management, dominion, and control over funds, property, and other assets belonging to the Petitioner, determining the time and manner in which such funds should be credited, expended or invested, and the means by which such property should be administered and disposed of, has control of all books of account, and other records pertaining to the financial affairs, trust funds, and trust property of Petitioner. Defendant has never rendered an accounting of the performance of its duties as a fiduciary and a guardian with respect to the property of Petitioner. Request for such information has been refused.

33. Irregularities in Property Management. Petitioner is informed and believes, and, upon such information and belief, states, that Defendant has not fulfilled its obligations to Petitioner, and that a full and complete accounting will disclose that substantial sums remain due and owing to Petitioner from the

Defendant by reason of the following acts and omissions:

(a) Payments in money, goods or services, appropriated by the Congress of the United States were not paid, delivered, or performed for Petitioner by reason of the acts or omissions of agents of Defendant.

(b) Payments due and owing to Petitioner were improperly allocated to persons not entitled to receive the same, and other funds held in trust for Petitioner by Defendant were debited with expenditures for obligations neither authorized by Petitioner nor properly chargeable to its account, under governing statutes.

(c) Funds held by Defendant in trust for Petitioner were not credited with the interest which should have accrued thereon.

(d) Funds and other property,

real and personal, which should have been held by Defendant in trust for Petitioner were administered without Petitioner's consent in ways not beneficial to Petitioner, and inconsistent with the trust obligations of Defendant.

34. Standards of Fair and Honorable Dealings. Defendant, had it adhered to standards of fair and honorable dealings in its transactions with Petitioner, would have promptly and faithfully carried out the various promises made by it, as hereinabove set forth; should have protected against trespass and alienation not only the lands of the so-called Santo Domingo Grant, but the lands outside the grant in which Petitioner had rights of use and occupancy; should have protected the water supply of Petitioner against impairment; and should have administered such property of Petitioner as came within its control in accordance with the standards of a prudent and honorable trustee. Standards of fair and honorable dealings further required that Defendant

should not have withheld from Petitioner and its members the right to vote, the benefits of the public land laws, the right to public school education, the right to employ their own attorneys and other employees, and the protection of the Indian Trade and Intercourse Laws which Congress extended to the Indian population of New Mexico in 1851.

35. Totality of Defendant's Conduct. Petitioner finally asserts that even if this Commission should determine that the separate acts and transactions set forth by Petitioner in the preceding paragraphs, or any of them considered by themselves, fail to constitute a cause of action justifying relief under the Act, nevertheless the combination and totality of all such acts and transactions, stretching over a period of a century, during which Petitioner has lost the use of substantial areas of land which it had exclusively used and occupied in 1846 for centuries prior thereto, should be held by this Commission to constitute grounds for full and fair compensation for the damages which Petitioner has suffered as a result of the course of action followed

by the Defendant during the period from 1846 to 1946.

WHEREFORE, Petitioner prays:

(1) That defendant be directed to furnish Petitioner a full and final statement of all funds and property, real and personal, taken, held or disposed of by Defendant in trust for Petitioner, or as guardian of Petitioner, showing specifically as to each transaction, by whom it was authorized, to whom any payment was made and the relation of such payment to the actual value thereof, and that Defendant in particular make disclosure of all such records as they appear in its General Accounting Office, its Bureau of Land Management, and all other agencies and offices.

(2) That this Court determine that Defendant is liable for the losses suffered by Petitioner, by reason of the facts above set forth.

(3) That this Commission determine the amount of the damages so suffered by Petitioner, and award judgment therefor, together with any interest properly owing, after proper allowances for credits and offsets.

(4) That Petitioner have such other and further relief as may to this Commission appear to be just and equitable and in conformity with standards of fair and honorable dealings.

Dated: August 11, 1951.

DARWIN P. KINGSLEY, JR.,
122 East 42nd Street,
New York City 17, N.Y.,

Attorney of Record for Petitioner.

APPENDIX D

Answer, Pueblo of Santo Domingo v. United States, Docket No. 355 before the Indian Claims Commission

Before the Indian Claims Commission

No. 355

THE PUEBLO OF SANTO DOMINGO, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

ANSWER

Now comes the defendant by its Assistant Attorney General and for its answer to the petition herein filed says:

First Defense

1. The petition fails to state a claim against defendant upon which relief can be granted.

Second Defense

2. As to the allegations in paragraph 1, defendant admits that the Pueblo of Santo Domingo is and has been for many years a tribe of American Indians residing within the present territorial limits of the United States.

3. As to the allegations in para-

graph 2, defendant admits that petitioner has been recognized by defendant as a tribe and corporation and is authorized under the laws of New Mexico to sue and be sued as a corporation. Defendant is not advised as to the truth of the remaining allegations of paragraph 2 and therefore denies the same.

4. Defendant admits the allegations of paragraphs 3, 4 and 5.

5. Defendant says that, in general, the allegations set forth in the two paragraphs numbered 6 in the petition describe in very broad language the nature of the claim or theory of suit upon which this action is alleged to be founded and require neither admission nor denial by defendant. However, in so far as petitioner alleges that defendant violated any promises, treaty commitments, and other obligations owed to petitioner, or failed to "protect valuable rights which petitioner enjoyed at the time when it first came under the sovereignty of defendant," such as "the right of unimpaired use of water, grazing lands, timber lands, and other lands which had been used from time immemorial," defendant

denies such allegations and requires strict proof thereof. Defendant, furthermore, denies that petitioner has been deprived of any lands, "which it once owned in full title."

6. Answering paragraph 7, defendant admits that petitioner occupies and possesses a tract of land identified on Royce's Map of New Mexico 1 as Tract #669. A patent to such lands was issued to petitioner by the United States on or about November 1, 1864, after Congress had confirmed the claim of petitioner thereto by the Act of December 22, 1858 (11 Stat. 374). The acreage named in the patent is 74,743.11 acres. Defendant denies all remaining allegations in such paragraph.

7. Defendant further says that the "Apache Nation," in Docket No. 22, has filed a petition with this Commission claiming aboriginal ownership of Tract #688 as identified on Royce's Map of New Mexico 1, which includes all of the area adjoining Tract #669 on the east, northeast and southeast. Thus, the "Apache Nation" is claiming "Indian title" to much land adjacent to Tract #669 which is

also claimed by this petitioner.

8. Defendant is not advised as to the truth of the allegations in paragraphs 8, 9, 10, 11, 12 and 13, and therefore, denies the same and requires strict proof thereof.

9. Answering paragraph 14, defendant admits that petitioner first came under the political jurisdiction of the United States in 1846 when General Kearny established a system of civil government in that territory. Defendant says that this entire territory was acquired by defendant from the Republic of Mexico in 1848 by virtue of the Treaty of Guadalupe Hidalgo (9 Stat. 922) at which time defendant, in accordance with the provisions of Article VIII of said treaty, agreed to respect all property rights of the then owners and their heirs to property within the limits of the territory then acquired. All allegations of paragraph 14 inconsistent with the foregoing admissions by defendant are denied.

10. Defendant denies all allegations of paragraphs 15 and 16, except those which are hereinafter specifically

admitted to be true. Defendant admits that an agreement was executed on or about July 9, 1850, between James S. Calhoun, Indian Agent in New Mexico Territory, acting for defendant, and the governor and two "principales" of this petitioner. The same agreement was signed by representatives of nine other pueblos, namely - Nambe, Tesuque, Santa Clara, Jemez, San Felipe, Cochiti, San Ildefonso, Santa Ana, and Cia (or Silla). Under the provisions of the aforesaid agreement, among other things, the pueblos agreed to place themselves under the exclusive jurisdiction and protection of the United States and never thereafter to associate with or give aid to any Indian tribe or band, or anyone else hostile to the United States. Any cases of aggression against the pueblos were to be submitted for adjustment and settlement to such tribunals as the Government of the United States might provide. At the earliest time possible, the Government of the United States agreed to afford to the pueblos, including petitioner, its protecting power and influence; and to adjust and settle, in the most practicable

manner, the boundaries of each pueblo, which should never be diminished but might be enlarged whenever defendant deemed it advisable. Defendant says that it has lived up to the terms of this agreement, even though it was never ratified by the Senate or proclaimed by the President. If any lands were lost by petitioner since the execution of the aforesaid agreement, defendant says that such loss was not because of any failure on the part of defendant to fulfill any obligation it might owe to petitioner.

11. Defendant specifically denies the allegations of paragraph 17. Defendant says that an ordinary guardian and ward relationship has never existed between defendant and petitioner and whatever control defendant has exercised over any property of petitioner has been done in good faith and for the sole benefit of petitioner. Defendant, furthermore, specifically says that it has at all times dealt fairly and honorably with petitioner and, although under no obligation so to do, has always protected petitioner in preserving whatever right, title or interest in any lands, water

rights, or other property petitioner may have had.

12. Answering paragraph 18, defendant admits the enactment of the two statutes referred to, namely, the Act of September 9, 1850 (9 Stat. 446, 452), and the Act of February 27, 1851 (9 Stat. 574, 587). Defendant says that by Section 17 of the 1850 Act, the Constitution and applicable laws of the United States were extended over the Territory of New Mexico and by Section 7 of the 1851 Act all laws then in force regulating trade and intercourse with the Indian tribes were extended to New Mexico.

13. Defendant admits the allegations of paragraph 19.

14. Defendant specifically denies the allegations of paragraphs 20 and 21.

15. Answering paragraph 22, defendant admits that the Surveyor General, after investigating the claims of petitioner, found the original Spanish grant of certain lands to petitioner to be valid and in his report of September 30, 1856, recommended its approval. Defendant also admits that thereafter, by the Act of

December 22, 1858, (11 Stat. 374), Congress confirmed such grant and that a patent for said land was issued to petitioner by defendant on November 1, 1864. The acreage in such patent was said to be 74,743.11 acres. Defendant admits that a resurvey of such land was made about 1907 and that the acreage of the grant was then reported to be 92,398.382 acres. Defendant denies all other allegations in paragraph 22 not herein specifically admitted.

16. Answering paragraphs 23 and 24, defendant admits that by decree of the Court of Private Land Claims in Case #89 the so-called La Majada Grant was confirmed and that by the Act of Congress dated January 28, 1879 (20 Stat. 592), the Mesita de Juana Lopez Grant was confirmed. Both of said grants substantially overlap and include much of the area herein claimed by petitioner and included in the survey of 1907 referred to above. Defendant is not advised as to the truth of the remaining allegations contained in paragraphs 23 and 24 and therefore denies the same and requires strict proof thereof.

17. Answering paragraph 25(a), because of the failure of petitioner to spell out or clearly define and describe its so-called "imperfect property rights" and "inchoate claims", defendant denies the allegations therein set forth relative to such "imperfect property rights" and "inchoate claims." Defendant also denies that it merely offered petitioner a "theoretic opportunity" before the Court of Private Land Claims (26 Stat. 854) to establish other grants which it had or claimed to have to land other than that represented by the Santo Domingo Pueblo Grant confirmed to it by Congress under the Act of December 22, 1858 (11 Stat. 374), and for which it was issued a patent on November 1, 1864. Defendant says that by the Act of March 3, 1891 (26 Stat. 854), Congress established a Court of Private Land Claims to investigate all private land claims, including those of this petitioner, if any, to lands within the limits of the territory derived by the United States from the Republic of Mexico, by virtue of any Spanish or Mexican grant and which at the date of the passage of such Act had not

been confirmed by Act of Congress or otherwise finally decided upon by lawful authority. Under the provisions of such Act, the Court had full authority to determine the validity of the title and boundaries of any lands submitted to it for adjudication. Availing itself of this judicial process, defendant says that this petitioner and the Pueblo of San Felipe appealed to the Court of Private Land Claims for a judicial determination of their title to a certain tract of land containing about 1,070.68 acres, more or less, claimed to have been granted jointly to such pueblos in 1770 while this territory was under the sovereignty of Spain. Whereupon, after due consideration of the evidence submitted, the court decreed title to such land to be vested in both the pueblos in equal share. (Decree of Confirmation, Court of Private Land Claims, December 8, 1898, Docket No. 142.) A patent was issued by defendant to the pueblos on or about May 5, 1905. All other allegations in paragraph 25(a) which have not been specifically admitted are denied.

18. Answering paragraph 25(b), defendant admits the correctness of the Supreme Court reference and quotation from the Santa Fe case (165 U.S. 675) but denies that the Act of August 13, 1946 (60 Stat. 1049), authorizes this commission to adjudicate controversies relating to "imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions".

19. Defendant denies the allegations in paragraph 25(c).

20. Defendant denies the allegations in paragraphs 26 and 27.

21. Answering paragraph 28, defendant says that any action taken by it regarding the matters complained of by petitioner in this paragraph was performed in good faith and for the best interests of petitioner at the time. Defendant says that nothing it did in connection with any property rights of petitioner, and of which complaint is herein made, in any way caused any damage to petitioner.

22. Answering paragraph 29, de-

fendant denies that it was guilty of any negligence or inexcusable delays in carrying out any obligations owed to petitioner.

(a) Defendant denies that by the Act of March 3, 1871 (16 Stat. 570), it denied petitioner the right to be represented by attorneys of its own choosing but says that by such act it required the approval of the Commissioner of Indian Affairs and Secretary of the Interior to the employment of any attorney chosen by petitioner. Defendant admits that it did not until about 1899 designate a government attorney to represent petitioner and other pueblos in litigation affecting them but denies that the authority of such attorney was limited to pueblo litigation with third parties and did not confer upon petitioner rights of representation enjoyed by non-Indians as alleged in subparagraph (a). Defendant further says that none of the allegations set forth in this subparagraph of the petition is in any way material or relevant to this cause; that none of such allegations is indicative of unfair or dishonorable dealings on the part of de-

fendant in its dealings with this petitioner or states a cause of action which entitles petitioner to relief under the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

(b) Answering paragraph 29(b), defendant says that it is not advised as to the truth of the allegations therein set forth relating to the maintenance of schools under Spanish dominion for the benefit of petitioner and therefore denies the same; furthermore, such allegations are irrelevant and in no way material to this action. Further answering this paragraph defendant denies that it at any time, either directly or indirectly, encouraged territorial and local authorities to deny free public education to members of this petitioner as alleged in such subparagraph (b).

(c) Defendant denies the allegations of subparagraph (c) except as to the enactment of the Act of March 3, 1905 (33 Stat. 1048, 1069).

(d) All other allegations in paragraph 29, including subparagraphs (a), (b) and (c), which are not specifically admitted, are hereby denied.

23. Answering paragraph 30, defendant denies the allegations set forth.

24. Answering paragraph 31, defendant admits that no treaties as referred to by petitioner were ever negotiated between defendant and the various Pueblo Indians, including petitioner, and also admits that certain treaties were negotiated with the Navajo and Apache Indians. Defendant avers, however, that this has no relevancy to any claim that this petitioner may or may not have against defendant under the Indian Claims Commission Act (60 Stat. 1049). Defendant also admits that the Supreme Court rendered the Joseph (94 U.S. 614) and Sandoval (231 U.S. 28) decisions referred to by petitioner but again alleges that such decisions have no bearing upon petitioner's right to recover in this case. Defendant specifically denies that it was responsible in any way for any losses as alleged in this paragraph and denies all other allegations not herein specifically admitted.

25. Answering paragraph 32, defendant admits that it has in its possession

certain books and records which disclose the receipt and disbursement of certain funds which may or may not be considered or found by this Commission to belong to petitioner herein, and defendant states that on or about October 3, 1952, a request was made of the General Accounting Office for a report in response to the allegations of this petition. At the time of filing this answer this report has not been received.

26. Answering paragraph 33, defendant denies each and every allegation therein set forth.

27. Answering paragraph 34, defendant denies that it has failed to carry out any promises made to petitioner or at any time failed to fulfill any duty that might be owed to petitioner in protecting and promoting the best interests of petitioner in the use and management of its property. Defendant further says that it has at all times dealt with petitioner in a fair and honorable manner. Defendant further denies the various allegations set forth in the last sentence of this paragraph and says that none of such allegations constitutes ground for relief

against this defendant.

28. As further evidence of its fair treatment of petitioner, defendant says that after the Pueblo Lands Board had investigated the various claims affecting certain lands within the exterior boundaries of the Pueblo of Santo Domingo Grant, as well as other lands claimed by petitioner, and had made its findings and final awards in connection with such claims, the Senate Committee on Indian Affairs, pursuant to resolutions of the 70th and 71st Congresses, caused a further investigation to be made of such claims of petitioner with the result that, although there was no legal obligation to do so, an additional award of $4,256.56 was thereafter appropriated for this petitioner, such appropriation being over and above the award of $16,411.00 made by the Pueblo Lands Board and appropriated by Congress for petitioner under the Acts of March 4, 1929 (45 Stat. 1569) and February 14, 1931, (46 Stat. 1122).

29. Answering paragraph 35, defendant denies each and every allegation therein set forth and again asserts that the petition herein filed fails to set

forth a claim against defendant upon which relief can be granted under the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

Third Defense

30. Petitioner never occupied from time immemorial or for many centuries prior to United States sovereignty over the Territory of New Mexico, to the exclusion of other Indians or non-Indians, lands adjacent to the Santo Domingo Pueblo Grant as claimed in paragraphs 7, 8 and 9 of this petition.

31. Petitioner never had any compensable right, title or interest in the lands referred to, except possibly the so-called Santo Domingo Pueblo Grant.

32. Neither Spain, Mexico nor the United States recognized in or conferred upon petitioner any compensable right, title or interest in or to said lands claimed by petitioner, except possibly the land included within the so-called Santo Domingo Pueblo Grant.

33. During the years that New Mexico was under the sovereignty of Spain and Mexico, long prior to the Treaty of

Guadalupe Hidalgo (9 Stat. 922) by which the United States acquired control over this Territory in 1848, the Spanish and Mexican governments made grants to non-Indians of much of the land herein claimed by petitioner. Under the provisions of Article VIII of the aforesaid treaty, defendant agreed to recognize and respect all bona fide grants of land then owned by Mexican citizens within the territory ceded to the United States by such treaty. Thus, if Spain or Mexico made grants of any of the land herein claimed aboriginally by petitioner, defendant says that it is not responsible to petitioner for such loss, if any, suffered by this petitioner.

Fourth Defense

34. Defendant further says that as evidence of its good faith and as a means of carrying out the provisions of Article VIII of the Treaty of Guadalupe Hidalgo between the United States and Mexico (9 Stat. 922), Congress passed the Act of July 22, 1854 (10 Stat. 308), entitled, "An Act to establish the office of Surveyor General of New Mexico, * * * and for other purposes." By this act the Congress

provided for the appointment of a Surveyor General for New Mexico Territory who should ascertain the origin, nature, character and extent of all claims to lands within such Territory as might have existed under the laws, usages and customs of Spain and Mexico. A full report of his findings was to be submitted to the Congress on all such claims as originated before the cession of the Territory to the United States with his decision as to the validity or invalidity of the same under the laws, usages and customs of the country before such cession; also a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, the number of inhabitants in each pueblo, and the nature of their titles to the land. Under the provisions of Section 8 of the Act, such report was to be submitted to Congress for such action as might be deemed just and proper with a view to confirm all bona fide grants, and thus give full effect to the aforesaid treaty between the United States and Mexico.

35. In accordance with the provisions of the above act, the land claim of

petitioner was duly investigated and reported upon favorably by the Surveyor General under date of September 30, 1856, whereupon Congress confirmed such claim by passing the Act of December 22, 1858, entitled "An Act to confirm the land claims of certain pueblos and towns in the Territory of New Mexico," (11 Stat. 374). Under this act the Commissioner of the Land Office was directed to have a survey made of all claims recommended for confirmation by the Surveyor General, and to cause a patent to be issued therefor, but with the proviso that such confirmation by Congress should only be construed as a relinquishment of all title and claim of the United States to such lands, and should not affect any adverse valid rights, should such exist.

36. Thereafter, in accordance with the aforesaid confirmation, the lands claimed by petitioner were duly surveyed and in conformity with the provisions of the Act of 1858 aforesaid, the United States issued a patent to such lands to petitioner on or about November 1, 1864.

37. Defendant, therefore, again says that it has at all times protected

the interests of petitioner in any land to which it has laid claim and that petitioner has no claim against defendant upon the allegations set forth in the petition.

38. Defendant says further that although under no obligation to do so defendant has, from time to time, expended various sums of money out of gratuity appropriations on behalf of petitioner and for its benefit, the exact amount of which is not known to defendant at this time but will be subsequently set out by an amendment hereto under Rule 12 if it shall be determined that defendant is liable to petitioner in any amount.

39. Defendant, while at all times asserting that petitioner has not set forth a claim upon which relief can be granted, further alleges that if any sum is found due petitioner by this Commission, petitioner is not entitled to interest thereon.

WHEREFORE, defendant prays that petitioner recover nothing in this action and that the petition be dismissed.

PERRY W. MORTON
Assistant Attorney General

WALTER A. ROCHOW,
Attorney,
Room 2134,
Department of Justice,
Washington 25, D.C.

I hereby certify that on the ____ day of November, 1955, fifteen (15) copies of the above answer were mailed to Darwin P. Kingsley, Jr., 230 Park Ave., New York 17, New York, the attorney of record for petitioner.

WALTER A. ROCHOW,
Attorney.

APPENDIX E

Stipulation as to Standing, Liability and Area, Pueblo of Santo Domingo v. United States, Docket No. 355 before the Indian Claims Commission

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SANTO DOMINGO,)
Petitioner,)
v.) Docket No. 355
UNITED STATES OF AMERICA,)
Defendant.)

STIPULATION AS TO STANDING TO SUE, LIABILITY AND AREA

The parties in the above-entitled claim hereby stipulate and agree as follows:

1. The Pueblo of Santo Domingo is and has been since time immemorial a tribe of American Indians residing within the present territorial limits of the United States. It has been recognized by the Government of the United States as a Tribe represented by its Governor and Council. This action was instituted within the time allowed by the Indian Claims Commission Act by and under the direction of the Petitioner, acting through its Governor and Council.

2. At the time of the Treaty of Guadalupe Hidalgo, which was concluded on February 2, 1948, 9 Stat. 922, the Pueblo of Santo Domingo aboriginally and exclusively used and occupied the area

delineated on the attached map, and the Defendant is liable for extinguishing the Petitioner's title to said area.

3. There shall be entered an interlocutory order that the Petitioner, the Pueblo of Santo Domingo, has the right and capacity under the Indian Claims Commission Act to bring and maintain this claim for and on behalf of the Pueblo of Santo Domingo, that the Petitioner has established Indian title to an area comprising approximately 77,237.24 acres and delineated on a map prepared by the Bureau of Land Management in August 1967, and that the Defendant is liable for having extinguished the Petitioner's Indian title to said area.

4. The parties agree to execute and file with the Commission a joint motion for entry of the interlocutory order provided for in this stipulation, submitting a proposed form of order for the approval of the Commission.

/s/
Darwin P. Kinglsey
Attorney of Record for
Petitioner in Docket No. 355

/s/

Assistant Attorney
General of the
United States

/s/

Howard G. Campbell
Attorney for Defendant

APPENDIX F

Opinion, Findings of Fact, and
Order of the Indian Claims Commission,
Pueblo of San Ildefonso, et al.,
v. United States, dated May 9, 1973

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SAN ILDEFONSO,	Dkt. No. 354
PUEBLO OF SANTO DOMINGO,	Dkt. No. 355
PUEBLO OF SANTA CLARA,	Dkt. No. 356
Plaintiffs,	
v.	
THE UNITED STATES OF AMERICA,	
Defendant.	

Decided: May 9, 1973

Appearances:

S. Bobo Dean, Attorney for Plaintiffs.
Darwin P. Kingsley, Jr., Karelson & Karelson.
Richard Schifter, and Strasser, Spiegelberg, Fried, Frank & Kampelman were on the Briefs.

Howard G. Campbell, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

These cases arise under clause 4 of section 2 of the Indian Claims Commission

Act (25 U.S.C. §70a) and involve the taking by the United States of plaintiff's lands without the payment of any compensation. Each plaintiff's claim is separate and distinct; the claims are not consolidated but are proceeding together for convenience in dealing with common issues.

The three plaintiffs are communities of town-dwelling Indians who live along the Rio Grande in northern New Mexico. During the period of Spanish sovereignty each plaintiff received a land grant from the crown, which was later confirmed by the United States. Additional lands have been set aside for Santa Clara and San Ildefonso as Indian Reservations. Santo Domingo holds a half interest in a small confirmed Spanish grant made jointly to it and the neighboring Indian pueblo of San Felipe. Each plaintiff formerly enjoyed use and occupancy under aboriginal title of a larger area including but extending well beyond its present land holdings. Parts of these larger areas were granted to third parties by the Spanish or Mexican governments. Other parts were taken from the plaintiffs by the United States. It is these latter parts only which we are concerned with here.

The Government has stipulated that it is liable to each plaintiff for the uncompensated extinguishment of aboriginal title land. Accompanying the Government's separate but similar stipulation with each plaintiff there is a map showing the outer boundaries of that plaintiff's area of aboriginal title and the parcels within it which the plaintiff still holds or which were granted away by prior sovereigns. On the map accompanying the Santo Domingo stipulation, however, a tract designated "San Felipe Indian Reservation" is also shown within the aboriginal boundaries, although it was not set aside until 1902, by Executive order of President Theodore Roosevelt.

On December 17, 1979, following filing of the stipulations, the Commission entered an order setting the instant cases for trial on the single question of ascertaining the date or dates on which the Government extinguished the plaintiffs' aboriginal titles to their respective stipulated areas of use and occupancy. On January 28, 1970, at the suggestion of the plaintiff, the Commission superseded the foregoing order with a new one, ordering tried, in addition to the question of the

date of taking, "the question of the Indian title of the plaintiff in Docket No. 355 to an area of approximately 8,600 acres now within the San Felipe Indian Reservation."

After trial on June 18, 1970, the parties submitted proposed findings and briefs, and the two questions specified in the order of January 28, 1970, are now before the Commission for decision.

I. The Dates of Taking

The record shows that the United States used at least three methods to dispose of those parts of the plaintiffs' aboriginal occupancy areas for whose taking the parties have stipulated it is liable. The first method was by conveyances under the public land laws to various grantees at different times; the second was by inclusion in the Jemez Forest Reserve;[1/] and

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1/ The Jemez Forest Reserve was established by a proclamation of President Theodore Roosevelt dated October 12, 1905 (Pl. Ex. TD-1) issued under authority of sec. 24 of the act of March 3, 1891, ch. 561, 26 Stat. 1103, as amended 16 U.S.C. §471. By Executive order of President Wilson dated April 6, 1915 (No. 2160), it was merged with the Pecos National Forest, and the combined forest was named the Santa Fe National Forest. Pl. Ex. TD-2.

the third way was by inclusion in New Mexico Grazing District No. 1 created under the Taylor Grazing Act.[2/] The plaintiffs contend the proper taking dates for the lands conveyed under the public land laws are the dates the Government issued patents to the grantees. For the lands included in the Jemez Forest Reserve, they contend for the date of creation of the reserve -- October 12, 1905. For the lands placed in the Taylor Grazing District, they contend for the date of establishment of the district -- June 21, 1941, except in the San Ildefonso case (Docket No. 345), where aboriginal title land not included in the original grazing district was brought in on December 14, 1944, by an order extending the district boundaries.[3/]

2/ Grazing District No. 1 in the State of New Mexico was established by order of the Secretary of the Interior dated June 12, 1941, issued under authority of sec. 1 of the Taylor Grazing Act, 43 U.S.C. 315. See 6 Fed. Reg. 3040 (1941).

3/ 9 Fed. Reg. 14650 (1944).

The Government contends that the laintiffs' aboriginal titles were ex-inguished on December 22, 1858, the date f an act of Congress (11 Stat. 374) con-irming the report of the Surveyor General f New Mexico on the validity of plain-iffs' Spanish land grants and ordering atents to issue.

Alternatively, the Government con-ends the entries and claims of rights by on-Indians under the public-land laws ithin the plaintiffs' aboriginal areas ad become so numerous by December 31, 905, that they extinguished Indian title s of that date.

In our decision on the Zia, Jemez, nd Santa Ana pueblo cases,[4] where the acts were quite similar to the instant ases, we held the correct dates of taking ere the date of establishment of the Jemez orest Reserve, the date of inclusion in razing District No. 2, and the various ates of adverse entries under the public and laws. The Government argued there hat an 1854 act of Congress[5] extinguished

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[4] Pueblo de Zia v. United States, Docket 37, 19 Ind. Cl. Comm. 56 (1968).

[5] Act of July 22, 1854, ch.103, 10 Stat. 308.

the pueblos' titles of its own force. That law, among other things, established the office of Surveyor General of New Mexico, authorizing him to investigate and report on lands claimed under prior sovereigns' grants, provided for donations of 160-acre tracts to white inhabitants of New Mexico, and, in section 7, provided that "any of the lands not taken under the provisions of this act shall be subject to the operation of the Preemption Act of fourth September eighteen hundred and forty-one..." [ch. 16, 5 Stat. 453]. We rejected the Government's contention. Here the Government's argument is somewhat different. It states that the Indians abandoned their aboriginal titles outside their confirmed grants by accepting patents for the grants under the 1858 act.

The Government cites the Walapai case in support of its contention.[6/] There the Supreme Court stated that the 1854 act

> . . . merely called for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the surveyor

6/ United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941).

> general but from action of Congress based on his reports. We are not advised that Congress took any such action.

Here, of course, Congress did act, by the statute of 1858. Under authority of that act, patents were issued to the plaintiff pueblos for areas they occupy to the present day. The Government contends their acceptance of these patents extinguished their aboriginal titles to outlying areas, just as did the Walapais' acceptance of the Walapai reservation in the cited Supreme Court case.

The situation of the present plaintiffs, however, differed significantly from that involved in United States v. Santa Fe Pacific R.R., supra. There, the Government was under no legal duty to create the Walapai Reservation. Here, international law obliged it to respect the land grants of prior sovereigns. Beard v. Federy, 70 U.S. (3 Wall.) 478, 491-492 (1866); Treaty of Guadalupe Hidalgo, Art. VIII, 9 Stat. 922, 929 (1848). The patents authorized by the 1858 act were in confirmation of such grants. To hold, in these circumstances, that the plaintiffs' acceptance of the patents extinguished their aboriginal title to outlying

areas would be equivalent to stating the United States made them pay for what they already owned and what it was already solemnly obligated to confirm.[7] There is no showing of an actual abandonment in 1858 of land previously used. The Government's contention for an 1858 taking date must be rejected.

Our 1968 Zia decision[8] is irreconcilable with the defendant's position that the settlements, claims, entries, and intrusions by non-Indians within the plaintiffs' aboriginal boundaries extinguished Indian title to the areas which remained uninvaded. The Government now urges us to overrule Zia (see Transcript, June 18, 1970, pp. 6-8), asserting that the controlling factor is that the various tracts,

7/ In Pueblo de Zia v. United States, 11 Ind. Cl. Comm. 131, 164 (1962), rev'd on other grounds, 165 Ct. Cl. 501 (1964), we held that New Mexico Indian Pueblos could claim aboriginal title even if they had received valid Spanish grants. The pueblos plaintiff in Zia, like those here, had accepted United States patents for their Spanish grants. The Zia case thus implicitly ruled against the defendant's present theory.

8/ See note 4, supra.

whether entered or not entered, were open to entry under the laws of the United States.

If the plaintiffs' aboriginal title areas were open to entry, it would not necessarily follow that the Indian title was extinguished before they were actually entered. United States v. Santa Fe R.R., 314 U.S. 339, 349 (1941); Plamondon ex rel. Cowlitz Tribe v. United States, 199 Ct. Cl. 523, 467 F.2d 935 (1972), aff'g Docket 128, 25 Ind. Cl. Comm. 442 (1971). To show extinguishment, there must be shown an exercise of dominion over the land inconsistent with the continuance of Indian title. Here, the defendant has not established that the Government intended to assert dominion over the plaintiffs' aboriginal title areas by making Federal public lands in New Mexico open to entry.

The General Land Office adopted a circular on May 31, 1884, instructing its field officers "to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon." See 3 Land Decisions 371 (1884). In 1887 and again in 1903 the circular was

reissued with amplifying language, so as to apply to:

> ...lands in the possession, occupation and use of Indian inhabitants, or covered by their homes and improvements.[9]

The circular was expressly applicable to "every land district...in any part of the public-land States and Territories."

Congress in 1891, when it established the Court of Private Land Claims to pass on the validity of alleged Spanish and Mexican grants in New Mexico, enacted:[10]

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place.

Thus it appears that the national policy of respecting unextinguished aboriginal title was in effect in New Mexico in

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[9] See 6 Land Decisions 341 (1887); Circulars and Regulations of the General Land Office, United States Government Printing Office, Washington: 1930, pp. 651-652; 43 C.F.R. § 2013.6 (1972).

[10] Act of March 3, 1891, c. 539, 26 Stat. 860.

the decades before 1905, and there was no intent to make all plaintiffs' areas legally open to entry. Cf. Cramer v. United States, 261 U.S. 219 (1923).

The defendant placed maps and excerpts from the records of the Bureau of Land Management in evidence showing the claims, applications, and entries on file prior to 1906. There were fairly numerous intrusions into the western part of the San Ildefonso area and the southern and extreme eastern parts of the Santo Domingo area. They consist largely of coal declaratory statements and mineral entries. In each case the parcels adversely claimed make up much less than half of the total acreage. In the case of Santa Clara, there was intrusion into only one fractional section at the extreme northeastern corner of the aboriginal title area. The witness who compiled the maps and excerpts was unable to state which claims and entries went to patent, and which were cancelled, rejected, or abandoned.

With the friendly farming Indians of the Southwest, the Government pursued a policy more respectful of property rights than with the nomadic tribes, who

were hostile, or considered potentially so. Absent clear and convincing evidence of intent to extinguish, an intent to protect the rights of these Indians must be inferred.

Under the circumstances, the fact that some entries were allowed in the plaintiffs' aboriginal areas is evidence of official negligence, or lack of knowledge of the plaintiffs' areas, rather than of an intention on the part of the United States to extinguish their whole titles. See Gila River Pima-Maricopa Indian Community v. United States, Docket 228, 27 Ind. Cl. Comm. 11, 15 (1972). We reject defendant's theory that the plaintiffs' Indian titles to their entire aboriginal areas were extinguished in 1905, or at any other date, by reason of the areas' being open to entry under the public land laws.

In regard to those parts of the plaintiffs' lands disposed of by the United States to third parties, a further question remains about the date of taking. The plaintiffs' urge that the correct taking dates are those on which patents issued, rather than the dates of entry as we held in Pueblo de Zia v. United States,

19 Ind. Cl. Comm. 56, 77 (1968). We adhere to Zia.[11/]

The plaintiffs' aboriginal title areas include several surveyed sections numbered 2, 16, 32, and 36, which, if nothing intervened, were granted to New Mexico for the support of public schools by the Acts of June 21, 1898, c. 489, 30 Stat. 484, and June 20, 1910, c. 310 §6, 36 Stat. 561.

Unextinguished Indian title prevents the vesting of school sections in a state. Minnesota v. Hitchcock, 185 U.S. 373, 388 (1902); cf. State of Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969), cert denied, 397 U.S. 1076 (1970); United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941). All or nearly all of the sections numbered 2, 16, 32, or 36 appear to

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11/ But we have found patent dates to govern in the case of mining claims. Papago Tribe of Arizona v. United States, Docket 345, 21 Ind. Cl. Comm. 403, 405 (1969). We suggest this distinction because the residence and cultivation requirements of the Homestead Act (43 U.S.C. §164) provide for visible and substantial disruption of customary Indian use, whereas the requirements of marking the boundaries on the ground and doing $100 of annual assessment work under the Mining Law (30 U.S.C. §28) do not.

have been included in the outer perimeters of the Forest Reserve or Grazing District withdrawals (or patented to third parties). For such sections the date of inclusion or entry are the taking dates. Pueblo de Zia v. United States, Docket 137, 19 Ind. Cl. Comm. 67, 73, (1968).

To summarize, we hold the following to be applicable taking dates as of which the plaintiffs' former lands should be evaluated:

Land	Date
Included in Jemez Forest Reserve	October 12, 1905
Placed in New Mexico Grazing District No. 1	June 21, 1941
Taken by extension of Grazing District No. 1	December 14, 1944
Granted to third parties under agricultural land laws	Entry dates
Granted to third parties under mineral land laws	Patent dates
School sections	Dates included in one of preceding categories.

II. The San Felipe Indian Reservation

The plaintiff Pueblo of Santo Domingo claims that it had tenancy in common with the Pueblo of San Felipe, under aboriginal title, of the tract President Theodore Roosevelt set aside in 1902 as a reservation exclusively for San Felipe.[12/] Santo Domingo contends the Executive order constituted an uncompensated taking of its interest, and prays judgment for one half the tract's value as of 1902.

The Government does not brief Santo Domingo's arguments on the merits. Instead, it claims that plaintiff has stipulated to exclude the San Felipe Reservation from its claim. Santo Domingo replies that the stipulation contains no such language, but even if it did, the Commission should relieve it from the effect of this mistake of fact to reach the merits of the issue.

12/ The Pueblo of San Felipe is not a party here, nor is it a claimant in any other docket before the Commission.

The pertinent parts of the stipulation referred to, which was filed with the Commission on October 29, 1969, read as follows:

> 2. . . . The Pueblo of Santo Domingo aboriginally and exclusively used and occupied the area delineated on the attached map, and the Defendant is liable for extinguishing the Petitioner's title to said area.
>
> 3. There shall be entered an interlocutory order ... that the Petitioner has established Indian title to an area comprising approximately 77,237.24 acres and delineated on a map prepared by the Bureau of Land Management in April 1967.

The map accompanying the stipulation shows a broad line surrounding what the legand identifies as "claimed aboriginal area." The San Felipe Reservation is clearly within the line. The San Felipe Reservation is listed in the legend of the map among the tracts whose acreage must be deducted from the 223,000.00 acres of the depicted aboriginal area to arrive at the 77,237.24[13/]

13/ When we deduct the acreages shown from 223,000.00 we get 77,237.92 acres

acres mentioned in paragraph 3 of the stipulation. If the San Felipe Reservation was aboriginally owned exclusively by Santo Domingo, as the parties in paragraph 2 of the stipulation (quoted above) agreed it was, and if in 1902 it was set aside by the Government exclusively for San Felipe without compensation to Santo Domingo, as it was, the consequences are obvious. Why then did the parties in paragraph 3 deduct its acreage from the area for which the defendant will be liable? The stipulation gives no explanation of this internal contradiction. It exhibits an inconsistency characteristic of inadvertent agreements signed without a real meeting of the minds.

The record shows that after entry of the Commission's order setting the Santo Domingo case for trial on the single issue of the taking date, the plaintiff's attorney on January 21, 1970, wrote as follows to our Chief Counsel:

> As we have discussed, I am enclosing a proposed revised form of order in the above

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13/ (cont.) instead of the figures stipulated by the parties.

> referenced dockets. It is my understanding from my discussion with Howard Campbell at the Department of Justice that agreement had been reached for scheduling two issues for trial on June 18, 1970: the date of taking with respect to all three cases and the original Indian title of the Pueblo of Santo Domingo, the petitioner in Docket No. 355, to 8,600 acres now within the San Felipe Indian reservation.
>
> I have asked Mr. Campbell to confirm to you that this was the understanding.

The end of the letter bears the notation, "Cc: Howard G. Campbell, Esquire."

The Commission's second order of January 28, 1970, expanding the issues to include the question of title to the San Felipe Reservation, is in the form submitted with plaintiff's letter. There is no corresponding letter from defense counsel. At the trial on June 18, 1970, defense counsel did not object to plaintiff's evidence on the San Felipe issue, and offered evidence directed to the merits of the same issue (Transcript, 10-11). Finally, he stated:

> . . . Now what happened, in Santa Clara was probably

> my fault. BLM, naturally, understood that it was to eliminate any valid Spanish grants that might be within the claimed areas, because that had been confirmed. And what to do with the San Felipe reservation of 8,000 acres never occurred to me, because I didn't know anything about. . . (Transcript, p. 12)

The following colloquy between plaintiff's and defendant's counsel occurs at page 15 of the transcript:

> Mr. Dean: I can establish that after the map was prepared, based upon the area of the claim, which did include most of the San Felipe Indian reservation, the Government declined to stipulate as to the plaintiff's aboriginal title with respect solely to the San Felipe area. Is that an accurate --
>
> Mr. Campbell: Sure, that is a question for the Commission to decide.

It is thus clear that the stipulation of October 29, 1969, does not embody any real understanding of the parties concerning the San Felipe Reservation.

The prevailing rule on repudiation of improvident stipulations is thus stated in Carnegie Steel Co. v. Cambria Iron Co., 185 U.S. 403, 444 (1902):

> But while the stipulation is undoubtedly admissible in evidence it ought not to be used as a pitfall, and where the facts subsequently developed show, with respect to a particular matter, that it was inadvertently signed, we think that upon giving notice in sufficient time to prevent prejudice to the opposite party, counsel may repudiate any fact inadvertently incorporated therein. This practice has been frequently upheld in this and other courts. The Hiram, 1 Wheat, 440; Hunt V. Hollingsworth, 100 U.S. 100, 103; Malin v. Kinney, 1 Caines, 117; Barry v. Mut. Life Ins. Co., 53 N.Y. 536.

The right to repudiate improvident stipulations includes matters of law as well as fact, and extends even to stipulations for settlement. Hunt v. Hollingsworth, 100 U.S. 100 (1879); The Hiram, 14 U.S. (1 Wheat.) 440 (1816); Future Plastics, Inc. v. Ware Shoals Plastics, Inc., 407 F.2d 1042 (4th Cir. 1969); Chouest v. A&P Boat Rentals, Inc., 321 F. Supp. 1290 (1971); cf. Swift & Co. v. Hocking Valley Ry., 234 U.S. 281 (1917). A strong statement in favor of relieving a party from one fact mistakenly agreed to in a stipulation, while letting the remainder of the

stipulation stand, was made by the Court of Claims. American Food Products. v. United States, 73 Ct. Cl. 526 (1932).

We do not read United States v. Southern Ute Indians, 402 U.S. 159 (1971), as modifying Carnegie Steel. Southern Ute simply does not deal with the question of whether a party can be relieved of an improvident stipulation prior to judgment. It held, rather, that after entry of a consent judgment in a prior case between the same parties, the plaintiff in a new action apparently concerning the same subject matter could not escape res judicata by showing that the stipulation upon which the prior judgment was based really did not mean what it said.[14/]

All the conditions for partial repudiation of a stipulation given in Carnegie Steel are met in the instant case. The evidence shows the stipulation to be factually inaccurate: Santo Domingo's use

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14/ Hunt v. Hollingsworth, 100 U.S. 100, 103 (1879), emphasizes that parties should be permitted to recede from improvement stipulations "at any time before final hearing and judgment."

of what is now the San Felipe reservation was not exclusive but joint. Admissions of attorneys for both sides, quoted above, show that their apparent agreement to discharge the Government from liability for taking the area was inadvertent. Our order of January 28, 1970, almost five months before the trial, broadening the issues to include the question of title to the San Felipe Reservation, if not the plaintiff's prior letter, gave defendant notice of the pro tanto repudiation in ample time to avoid prejudice.

Under such circumstances, to now hold the plaintiff barred from claiming compensation for the Government's taking of the Santo Domingo interest in the San Felipe Reservation would be wholly irreconcilable with the remedial purposes of the Indian Claims Commission Act. Accordingly, we turn to the merits of the question.

Santo Domingo and San Felipe are neighboring Indian villages, occupying contiguous confirmed Spanish land grants. Their inhabitants speak the same Keres Language, practice the same religion, and take part in each other's ceremonies. In the late eighteenth century the two pueblos submitted a joint application to obtain

title to the land lying between them to the Spanish governor of New Mexico, who granted it, in the name of the King, on September 10, 1770. At least since that date the two peoples made common use of the entire area now embraced in the San Felipe Executive Order Indian Reservation and the adjacent confirmed Santo Domingo-San Felipe Joint Grant. In the late nineteenth century, the two pueblos petitioned the Court of Private Land Claims for confirmation of the 1770 grant as to the entire area. In a 3-2 decision dated December 8, 1898, the court confirmed only the northern part, the present-day joint grant. Counsel in the proceedings before the Court of Private Land Claims was provided for the pueblos by the Government. The pueblos appealed to the Supreme Court of the United States; but Congress failed to appropriate funds for further legal services, and the appeal was dismissed for want of prosecution.

The Executive order creating the present San Felipe Indian Reservation was issued largely at the urging of the attorney who had represented the United States before the Court of Private Land Claims in opposition to the pueblos' petition. He

stated that while he felt the court was correct in holding the area not included in the Spanish grant, it had been immemorially in the joint possession of the two pueblos. His conclusion is amply supported in the present record. Our Findings 11 to 20, infra, show that the evidence of joint use and occupancy by Santo Domingo and San Felipe is clear, convincing and uncontradicted.

Santo Domingo's and San Felipe's understanding that they had joint title to what is now the San Felipe Executive Order Reservation was based on their interpretation of the Spanish grant of 1770, but the decision of the Court of Private Land Claims is res judicata against any contention that the two pueblos had joint legal title to the subject tract. They either had joint aboriginal title or no title at all.15/

15/ Despite some evidence to the contrary, neither pueblo could successfully assert exclusive use of the tract.

Because of the uncontradicted positive evidence of the joint use of the area by the two pueblos, exclusive of all others, the Commission concludes that here is proven a true joint aboriginal title, heretofore only hypothesized.[16/] Aboriginal title has been defined as:

> . . . the right because of immorial occupancy to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of the early nomads to wander at will in the search for food.[17/]

The assertion of the right to exclude others is central to the concept of property in land. Inclusion of the requirement for "exclusive" use in the usual formulation for aboriginal title requires that some special connection between that

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16/ See, e.g., Iowa Tribe v. United States. 195 Ct. Cl. 365 (1971); infra, note 26.

17/ Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945). See also United States v. Santa Fe Pacific R.R., 314 U.S. 335, 339 (1941).

claiming tribe and that land must be shown. Where mere use breeds title, "exclusiveness" provides a focus for the evidentiary problem of showing land owned as opposed to land used without ownership, including that used in common with others. Common use of land casts doubt on true proprietorship; ordinarily, without evidence of exclusiveness, the conflicting inferences cannot be resolved to support a finding of title in either or both users. See e.g. Hualapai Tribe v. United States, Docket No. 90, 18 Ind. Cl. Comm. 382 (1967).

No legal principle, however, bars joint aboriginal title. The assertion of a right to exclude others can exist in joint tenants as well as in sole proprietors. That such title has not been observed in previous proceedings reflects the usual absence of positive evidence, such as documents, to show an explicit joint interest in addition to common use.

Indian tribes originally possessed full powers of sovereignty. From time to time these powers have been limited or extinguished by Federal law. But what is not expressly taken away remains within the domain of tribal sovereignty.[18/]

Sovereign power includes the ability to hold land in common with other sovereigns.[19] We know of no law which deprived the pueblos of New Mexico of this ability.

Among the aboriginal sovereign powers of Indian tribes was that of making treaties with each other. The power continued after American independence; and Federal approval was not a prerequisite to validity, even of treaties whereby one tribe sold land to another. The tribes had power to sell partial interests and thus create joint tenancies.[20]

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[18] F. Cohen, Handbook of Federal Indian Law 122 (1941).

[19] Cf. Convention with Great Britain of October 20, 1818, 8 Stat. 248.

[20] United States v. Emigrant New York Indians, 177 Ct. Cl. 263 (1966). Cf. Treaty of Doaksville, November 4, 1854, between the Choctaw and Chickasaw Nations, 10 Stat. 1116 (ratified by the U.S. Senate, although the United States was not a party).

As well as justification from legal theory for the existence of joint aboriginal title, there is historical evidence of its existence in the treaties. In a number of treaties the Government accepted joint land cessions from two or more Indian tribes.[21] Another treaty contains the following language:

> The Maimies explicitly acknowledge the equal right of the Delawares with themselves to the country watered by the White River. [22]

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[21] E.g., Treaty of For Wayne of June 7, 1803, with Delawares, Shawanoes, Putawatimies, Miamies, Eel River, Weeas, Kickapoos, Piankashaws, and Kaskaskias nations of Indians, 7 Stat. 74 (Article 3d provides for joint cession of the Great Salt Spring); Treaty of L'Arbre Croche and Michilimackinac of July 6, 1820, with Ottawa and Chippewa nations of Indians, 7 Stat. 207 (cession of"the Saint Martin Islands in Lake Huron, containing plaster of Paris").

[22] Treaty of Fort Wayne of September 30, 1809, with the tribes of Indians called the Delawares, Putawatimies, Miamies and Eel River Miamies, 7 Stat. 113, 114.

It was not uncommon for treaty language to provide for joint title interests, although it is not always clear whether a new title was created or a pre-existing joint aboriginal use recognized.[23/] The Court of Claims held the Treaty of Grouseland to constitute a recognition by the United States of joint title to certain land in a signatory tribe and a non-signatory tribe.[24/]

The Court of Claims stated in the first case which clearly enunciated the requirement of exclusiveness to establish aboriginal title:

> In all cases there must have been actual use or occupancy and not mere constructive or desultory possession; some mastery of a tribe

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23/ Treaty of Washington, D.C., of May 27, 1836, with Ottawa and Chippewa nations, 7 Stat. 491.

24/ United States v. Kickapoo Tribe, 174 Ct. Cl. 550, 554 (1966), construing Treaty of August 21, 1805, 7 Stat. 91. The signatory title was the united nation of the Miamis, Eel River, and Weas. The non-signatory was the Kickapoo Tribe. As authority for its holding the Court of Claims cited the dictum in the aboriginal title case, Sac and Fox, infra, note 26; see 174 Ct. Cl. 555.

> over the soil to the exclusion of all others, or the joint possession of two or more tribes such as gave to each something of a fixed habitation or use of the land as hunting ground to establish a title by occupancy. 25/

At least four other times the Court of Claims has stated that there can be joint aboriginal title of two or more tribes, based on amicable possession in common.26/

When it is proved by such clear evidence as here that two tribes like the Santo Domingos and the San Felipes in conscious privity made joint amicable use of a definite area for a long time, to the exclusion of all other Indians, we have no

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25/ Choctaw and Chickasaw Nations v. United States, 34 Ct. Cl. 17, 51 (1899), rev'd on other grounds, 179 U.S. 494 (1900).

26/ See Sac and Fox Tribe of Indians v. United States, 161 Ct. Cl. 189, 202, 315 F.2d 896, 903, cert. denied, 375 U.S. 921 (1963); United States v. Kickapoo Tribe, 174 Ct. Cl. 550, 555 (1966); Confederated Tribes of the Warm Springs Reservation, 177 Ct. Cl. 184, 194 (1966); Iowa Tribe of the Iowa Reservation v. United States, 195 Ct. Cl. 365 (1971).

hesitation in holding that they had joint aboriginal title.[27]

The defendant extinguished the Santo Domingo one-half interest on June 13, 1902.

The case will now proceed to trial to determine the values of the various parcels taken from the plaintiffs by the defendant. With respect to the tracts disposed of to third parties, the parties are encouraged to confer and agree upon an average valuation date or a series of average dates for the groups of dispositions made during successive periods.

/s/
Richard W. Yarborough
Commissioner

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[27] This discussion attempts to avoid mixing the title determination with an entity determination by making it clear that we regard the two pueblos as separate entities, rather than stating the case as being one of a super-entity for the purpose of holding joint title to the subject tract, with the sub-entities performing other separate functions. If a complete merger of two tribes into one entity were required as a prerequisite for joint title, joint title need never have been so consistently hypothesized, for such a question would be resolved by the entity determination. Cf. Iowa Tribe v. United States, supra, at 370.

We concur:

/s/
John T. Vance, Commissioner

/s/
Margaret H. Pierce,
Commissioner

/s/
Brantley Blue, Commissioner

Kuykendall, Chairman, concurring in part and dissenting in part.

I concur with the majority except insofar as they have determined that the Pueblo of Santo Domingo (Docket 355) held aboriginal title to an undivided one-half interest in the tract of land described in finding 12. This holding is based upon a finding that the Santo Domingo Indians and the San Felipe Indians had amicably used and occupied one particular 8600 acre tract in common for a long time. From this fact the majority has concluded that the two pueblos owned joint aboriginal title to the tract. The facts pertaining to the grant of land by Spain to the two pueblos for joint use, which are set forth fully by the majority, do not, in my opinion, require or enable the Commission to conclude that the two pueblos possessed joint title of any kind.

Santo Domingo's claim is one based on aboriginal or Indian title and must rest on proof of actual, exclusive, and continuous use and occupancy for a long time prior to the loss of the property. By allowing this tribe to recover on the basis of its common use of a small area with another Indian pueblo, the majority

has thereby excepted this plaintiff from the requirement that its Indian title be established by exclusive use and occupancy.

To reach this result the majority has relied on several footnoted comments of the Court of Claims which suggest the general possibility that two or more tribes might acquire aboriginal title by inhabiting certain territory in "joint and amicable possession." While neither this Commission nor the court has ever found an instance of "joint aboriginal title," I believe the Court of Claims contemplated that such a possibility might exist only when two or more tribes had become so closely allied or integrated in their land use and occupancy that they had in fact become virtually one land-using entity or what might be termed "joint owners" of the land. But I do not believe this concept is applicable to a situation where two separate entities, each possessing Indian title to its own lands, attempt to assert "joint Indian title" to an area between their respective lands which is commonly used by both tribes. I will refer only to two of the latest decisions of the Court of Claims,

which along with many preceding opinions cause me to disagree with my fellow Commissioners:

In Seminole Indians, v. United States, 197 Ct. Cl. 350, 356 (1972), involving overlapping Creek and Seminole aboriginal land claims in Florida the court said:

> . . . .two groups cannot both have been in exclusive and long-continued possession of the overlapping area at the time it came into the hands of the United States; the claims are mutually exclusive.

In the case of the Iowa Tribe and the Sac and Fox Tribe (Docket 135), the Iowa plaintiffs were found to have held aboriginal title to a defined tract while the Sac and Fox were found to have held aboriginal title to other defined lands. The plaintiffs were denied recovery for lands which neither exclusively used and occupied. In its decision on December 10, 1969, the Commission specifically considered the claims to areas which were commonly used. The reasons and authority for rejecting such claims are succinctly set forth therein. Iowa Tribe v. United States, Docket 135, 222 Ind. Cl. Comm. 232,

278-83 (1969), affirmed 195 Ct. Cl. 365 (1971).

On appeal the Iowa and the Sac and Fox plaintiffs sought reversal of the Commission's determination that the two tribes did not have joint Indian title to the unawarded lands. In affirming the Commission the court noted, at page 370:

> . . . The Iowas and the Sac and Fox did not consider themselves, and were not treated, as a single or closely integrated entity, but rather as separate political groups which were friends or allies (for the most part). Their use of the same lands may have been in common -- like much of Indian use of the mid-western and western regions -- but the Commission could properly decide that it was not proved to be truly joint, and therefore that each separate tribe's claim to Indian title would have to be tested on its own distinct basis.

In the instant case the Santo Domingo and the San Felipe were not a single or closely integrated entity. The Santo Domingos had aboriginal title to a defined area and the San Felipes possessed similar title to other lands. As in the case of

the Iowas and the Sac and Fox, there was an area between their respective lands which was commonly used by the two tribes. But this fact does not warrant a finding of "joint Indian title." As a separate and distinct entity, the Santo Domingo tribe's claim must be tested on its own merits. It may recover for the lands which it exclusively used and occupied, but it may not recover for part of the 8600 acre tract used in common with another friendly pueblo and, therefore, not exclusively used and occupied by it.

/s/
Jerome K. Kuykendall,
Chairman

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SAN ILDEFONSO,	Docket No. 354
PUEBLO OF SANTO DOMINGO,	Docket No. 355
PUEBLO OF SANTA CLARA,	Docket No. 356
Plaintiffs,	
v.	
THE UNITED STATES OF AMERICA,	
Defendant.	

Decided: May 9, 1973

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Stipulation of the Parties. On October 29, 1969, the United States and each of the three plaintiffs entered into a stipulation and filed the same with this Commission. The stipulation between the United States and the Pueblo of Santa Clara, filed in Docket No. 356, reads as follows (omitting heading and signatures):

STIPULATION AS TO STANDING TO SUE LIABILITY AND AREA

The parties in the above-entitled claim hereby stipulate and agree as follows:

1. The Pueblo of Santa Clara is and has been since time immemorial a tribe of American Indians residing within the present territorial limits of the United States. It has been recognized by the Government of the United States as a Tribe represented by its Governor and Council. The Pueblo has a written constitution approved by the Secretary of the Interior on December 20, 1935, and amended as of December 29, 1939. This action was instituted within the time allowed by the Indian Claims Commission Act by and under the direction of the Petitioner, acting through its Governor and Council.

2. At the time of the Treaty of Guadalupe Hidalgo, which was concluded on February 2, 1848, 9 Stat. 922, The Pueblo of Santa Clara aboriginally and exclusively used and occupied the area delineated on the attached map, and the Defendant is liable for extinguishing the Petitioner's title to said area.

3. There shall be entered an interlocutory order that the Petitioner, the Pueblo

of Santa Clara, has the right and capacity under the Indian Claims Commission Act to bring and maintain this claim for and on behalf of the Pueblo of Santa Clara, that the Petitioner has established Indian title to an area comprising approximately 31,940.86 acres and delineated on a map prepared by the Bureau of Land Management in August 1967, and that the Defendant is liable for having extinguished the Petitioner's Indian title to said area.

4. The parties agree to execute and file with the Commission a joint motion for entry of the interlocutory order provided for in this stipulation, submitting a proposed form of order for the approval of the Commission.

The stipulation between the United States and the Pueblos of San Ildefonso (Docket No. 354) and Santo Domingo (Docket No. 355), respectively, are identical to the above quoted stipulation except for names and acreages and for omission of the underlined sentence referring to a written constitution approved by the Secretary of the Interior.

The Commission adopts the recitals of fact in the foregoing stipulations as its findings, except that it does not find that plaintiff Pueblo of Santo Domingo had

exclusive aboriginal use and occupancy of any land now within the San Felipe Indian Reservation.

2. Land Descriptions of Aboriginal Title Areas. The plaintiffs' respective areas of exclusive aboriginal occupancy shown on the maps attached to the stipulations referred to in Finding No. 1 are described as follows. Parcels within the exterior boundaries of these areas which were the subject of grants of prior sovereigns or which have been established as Indian reservations by the United States are excluded from the following descriptions and from the acreage figures at the end of each description. In case of any variance between the descriptions herein and the maps, the latter shall prevail.

San Ildefonso (Docket No. 354)

Commencing at a mountain peak located about 500 feet due south of the southwest corner of the Santa Clara Reservation;

Thence southeasterly, northeasterly, southerly, southeasterly, northeasterly, southwesterly, southeasterly, northeasterly and southeasterly along the mountain north of Guaje Canyon to a point on said

ridge lying northeast of the southwest corner of Section 26, T. 20 N., R. 6 E.;

Thence due north to a ridge immediately north of Chupaderos Canyon;

Thence northeasterly, easterly and southeasterly along said ridge to the point where it intersects the north boundary of the San Ildefonso Pueblo Grant;

Thence east along the north boundary of the San Ildefonso Pueblo Grant to the northeast corner of said Grant;

Thence southeasterly to a point on a line lying halfway between the east boundary of the San Ildefonso Pueblo Grant and the west boundary of the Pojoaque Pueblo Grant.

Thence south along said line to the Calabasa Arroyo;

Thence westerly along the Calabasa Arroyo to Canada Ancha;

Thence northwesterly along Canada Ancha to the Rio Grande;

Thence southwesterly along the Rio Grande to the ridge lying immediately north of the Rito de los Frijoles;

Thence northwesterly and northerly along said ridge to the source of the Rito de los Frijoles;

Thence northerly to the peak of Pajarito Mountain;

Thence northerly to the point of beginning.

Saving and excepting therefrom:

San Ildefonso Pueblo Grant
Jacona Grant
Caja Del Rio Grant
Ramon Vigil Grant
Baca Location No. 1
Santa Clara Reservation
San Ildefonso Reservation

insofar as they lie within the perimeter described.

Containing 66,227.00 acres, more or less.

Santo Domingo (Docket No. 355)

The aboriginal title lands are divided into six separate tracts, designated "A" to "F" as follows:

A. Commencing at Cerro la Jara run due east to the Peralta Canyon;

Thence southeasterly along the Peralta Canyon to a point where

the canyon intersects the northern boundary of the Canada de Cochiti Grant;

Thence due west along said boundary to the point of intersection with a line projected from Bear Springs Peak to Cerro la Jara;

Thence northeasterly along said line to the point of beginning.

B. From Bear Springs Peak in Section 30, T. 17 N., R. 4 E., along a line projected toward Cerro La Jara, northeasterly to the point of intersection with the southern boundary of the Canada de Cochiti Grant;

Thence due east along said boundary to the Peralta Canyon;

Thence southeasterly along the Peralta Canyon to the point of intersection with the western boundary of the Cochiti Pueblo Grant;

Thence due south along the western boundary of the Cochiti Pueblo Grant to the point of intersection with the northern boundary of the Santo Domingo Pueblo Grant;

Thence northwesterly, south, and southeasterly along the Santo Domingo Pueblo Grant boundary to the northwest

corner of the San Felipe Pueblo Grant;

Thence due south along the west boundary of the San Felipe Pueblo Grant to the point of intersection with the township line between Ts. 14 and 15 N., R. 4 E.;

Thence northwesterly, on a line projected to strike Borrego Spring, to the point of intersection with the east boundary of the Ojo del Borrego Grant;

Thence north and westerly along the boundary of the Ojo del Borrego Grant to a point on the previously mentioned line projected to strike Borrego Spring;

Thence northwesterly along said line to Borrego Spring;

Thence northeasterly to Bear Springs Peak, the point of beginning.

C. From the southeast corner of the Santo Domingo Pueblo Grant south along the western boundary of the Mesita de Juana Lopez Grant to the point of intersection with the north boundary of the Ortiz Mine Grant;

Thence west and south along the boundary of the Ortiz Mine Grant to the point of

intersection with a line projected from Tuerto Spring northwesterly to a point on the Arroyo Coyote lying near the northwest corner of Section 25, T. 13 N., R. 6 E.;

Thence northwesterly along said line to the Arroyo Coyote;

Thence southwesterly, westerly, and northwesterly along Arroyo Coyote to the point of intersection with the east boundary of the Town of Tejon Grant;

Thence north and west on the boundary of the Town of Tejon Grant to the Arroyo Coyote;

Thence northwesterly along Arroyo Coyote to its confluence with the Arroyo Tonque:

Thence down the Arroyo Tonque to the intersection with the eastern boundary of the San Felipe Executive Order Indian Reservation;

Thence north along the eastern boundary of said Indian reservation to its intersection with the south boundary of the Santo Domingo Pueblo Grant;

Thence southeasterly along the south boundary of the Santo Domingo Pueblo Grant to the place of beginning.

D. From the Turquoise Trading Post southeasterly, on a line projected to strike Mt. Chalchihuntl, to the point of intersection with the north boundary of the Sitio de los Cerrillos Grant;

Thence westerly along the north boundaries of the Sitio de los Cerillos Grant, the Sitio de Juana Lopez Grant and the Mesita de Juana Lopez Grant to the point of intersection with the east boundary of the La Majada Grant;

Thence north on the east boundary of the La Majada Grant to a point on the Santa Fe River;

Thence easterly along the Santa Fe River to the point of intersection with the east section line of Section 1, T. 15 N., R. 7 E.;

Thence southeasterly to the Turquoise Trading Post, the point of beginning.

E. From the southwest corner of the Sitio de Juana Lopez Grant easterly along the south boundaries of the Sitio de Juana Lopez Grant and the Sitio de los Cerrillos Grant to a point on a line projected from Turquoise Trading Post southeasterly to Mt. Chalchihuntl;

Thence southeasterly along said line to Mt. Chalchihuntl;

Thence southwesterly to Devel's Throne;

Thence northwesterly and westerly along the boundary of the Alamitos or Juan Salas Grants to the point of intersection with the boundary of the Mesita de Juana Lopez Grant;

Thence north on the east boundary of the Mesita de Juana Lopez Grant to the point at which it intersects the west boundary of the Sitio de Juana Lopez Grant;

Thence south on the west boundary of the Sitio de Juana Lopez Grant to the point of beginning.

F. From Cerrillos southwesterly on a line projected to Madrid, to the point of intersection with the east boundary of the Mesita de Juana Lopez Grant;

Thence north along said boundary to the southwest corner of the Alamitos or Juan Salas Grants;

Thence southeasterly and north along the boundary of the Alamitos or Juan Salas Grants to the point of inter-

section with a line projected from Devils' Throne to Cerrillos;

Thence southeasterly along said line to Cerrillos, the point of beginning.

Containing 77,237.24 acres, more or less.

Santa Clara (Docket No. 356)

The aborigianl title lands are divided into three separate tracts, designated "A," "B," and "C," as follows:

A. Commencing at the intersection of the north boundary of the San Ildefonso Grant and the west boundary of the Santa Clara Pueblo Grant, in Section 30, T. 20 N., R. 8 E.;

Thence west along the north boundary of the San Ildefonso Grant to the point where said boundary intersects the ridge between Garcia Canyon and Chupaderos Canyon;

Thence northwesterly, westerly, and southwesterly along said ridge to a point near the northwest corner of Section 26, T. 20 N., R. 6 E.;

Thence south to the mountain ridge immediately north of Guaje Canyon;

Thence westerly and northwesterly

along said ridge to a point on Caballo Mountain at which said ridge line intersects the south boundary of the Santa Clara Indian Reservation;

Thence easterly along the boundary of the Santa Clara Indian Reservation, to the point of intersection of the south boundary of the Santa Clara Indian Reservation with the west boundary of the Santa Clara Pueblo Grant;

Thence south on the west boundary of the Santa Clara Pueblo Grant to the point of beginning.

B. Commencing at the point at which the south boundary of the Santa Cruz Grant intersects the east boundary of the Santa Clara Pueblo Grant;

Thence northeasterly along the south boundary of the Santa Cruz Grant to a point on said boundary due south of Quarteles;

Thence south along a line extending due south from Quarteles to the point of intersection of said line with the north boundary of the Pojoaque Pueblo Grant;

Thence west along the north boundary of the Pojoaque Pueblo Grant to its point of intersection with the east

boundary of the Santa Clara Pueblo Grant;

Thence north along the east boundary of Santa Clara Pueblo Grant to the point of beginning.

C. From a point in section 31, T. 21 N., R. 5 E., lying at the center of the divide between the source of the Santa Clara Creek and the source of the Rito de los Indios due north to the southern boundary of the Polvadera Grant;

Thence east along the southern boundary of the Polvadera Grant to its point of intersection with the west boundary of the Juan Jose Lobato Grant;

Thence south-southeasterly and east-northeasterly along the west and south boundaries, respectively, of the Juan Jose Lobato Grant to a point due north of Clara Peak;

Thence due east to the west boundary of the Bartolome Sanchez Grant;

Thence south on the west boundary of the Bartolome Sanchez Grant to the north boundary of the Santa Clara Pueblo Grant, or, if the west boundary of the Bartolome Sanchez Grant does not intersect the north boundary of the Santa Clara Pueblo Grant, then to said north boundary projected so as to intersect said

west boundary (also projected if necessary to make the closure);

Thence easterly or westerly along the north boundary of the Santa Clara Pueblo Grant (projected as necessary) to the northwest corner thereof;

Thence south along the west boundary of the Santa Clara Pueblo Grant to the northeast corner of the Santa Clara Indian Reservation;

Thence westerly along the north boundary of the Santa Clara Indian Reservation to the east boundary of the Baca Location No. 1;

Thence north and west along the boundary of the Baca Location No. 1 to a point south of the point of beginning;

Thence due north to the point of beginning.

Containing 31,940.86 acres, more or less.

3. Indian Title Lands Patented To Third Parties Under the Public Land Laws. Various parcels of the plaintiffs' Indian title lands described in Finding No. 2 have been patented by the defendant to third parties, at dates ranging from 1872 or before to 1962 or later.

4. Indian Title Lands Included in Jemez Forest Reserve. The defendant included various parcels of the plaintiffs' Indian title lands described in Finding No. 2 in the Jemez Forest Reserve created by Proclamation of President Theodore Roosevelt dated October 12, 1905. Said parcels are described as follows:

San Ildefonso

Commencing at a mountain peak located about 500 feet due south of the southwest corner of the Santa Clara Reservation;

Thence southeasterly, northeasterly, southerly, southeasterly, northeasterly, southwesterly, southeasterly, northeasterly and southeasterly along the mountain north of Guaje Canyon to a point on said ridge lying northeast of the southwest corner of Section 26, T. 20 N., R. 6 E.;

Thence due north to a ridge immediately north of Chupaderos Canyon;

Thence northeasterly, easterly, and southeasterly along said ridge to the point where it intersects the section line between section 21 and section 22, T. 20 N., R. 7 E.;

Thence due south to the northern boundary of the San Ildefonso

Indian Reservation;

Thence due west to the northwest corner of the San Ildefonso Indian Reservation;

Thence due south along the western boundary of the San Ildefonso Indian Reservation to the northern boundary of the Ramon Vigil Grant;

Thence due west along the northern boundary of the Ramon Vigil Grant to the northwest corner of the Ramon Vigil Grant;

Thence southerly along the western boundary of the Ramon Vigil Grant to the township line between Township 19 North and Township 18 North;

Thence north along the eastern boundary of Baca Location No. 1 to the point of beginning.

Santo Domingo

From a point in Section 34, Township 16 North, Range 5 East, where the western boundary of the Pueblo of Cochiti Grant intersects the northern boundary of the Santo Domingo Pueblo Grant north along the western boundary of the Pueblo of Cochiti Grant to the Peralta Canyon;

Thence northwesterly along the Peralta Canyon to the southern boundary of the Canada de Cochiti Grant;

Thence west along the southern boundary of the Canada de Cochiti Grant to the point where said boundary intersects a straight line projected between Cerro La Jara and Bear Springs Peak;

Thence southwesterly along said line to Bear Springs Peak;

Thence southwesterly on a straight line to Borrego Spring;

Thence southeasterly along a line projected between Borrego Spring and the point where the west boundary of the San Felipe Pueblo Grant intersects the township line between T. 14 N. and T. 15 N. to the northern boundary of the Ojo del Borrego Grant;

Thence southeasterly, easterly and northeasterly along the northern boundary of the Ojo del Borrego Grant to the northeast corner of the Ojo del Borrego Grant;

Thence northeasterly to the northwest corner of the Santo Domingo Pueblo Grant;

Thence southeasterly along the northern boundary of the Santo Domingo Pueblo Grant to the point of beginning.

Also Tract A described in Finding No. 1, above.

Santa Clara

Northern Area:

From a point in section 31, T. 21 N., R. 5 E., lying at the center of the divide between the source of the Santa Clara Creek and the source of the Rito de los Indios due north to the southern boundary of the Polvadera Grant;

Thence east along the southern boundary of the Polvadera Grant to its point of intersection with the west boundary of the Juan Jose Lobato Grant;

Thence south-southeasterly and east-northeasterly along the west and south boundaries, respectively, of the Juan Jose Lobato Grant to a point due north of Clara Peak;

Thence due east to the section line between sections 20 and 21, T. 21 N., R. 7 E.;

Thence south along the section lines between section 20 and 21, 28 and 29, and 32 and 33, T. 21 N., R. 7 E., to the north boundary of the Santa Clara Indian Reservation;

Thence east, north, east, north, east, south, east, south, east, south, and east along the boundary of the Santa Clara Indian Reservation to the eastern boundary of Baca Location No. 1;

Thence north and west along the eastern and northern boundaries, respectively, of Baca Location No. 1 to a point in section 31, T. 21 N., R. 5 E., lying due south of the point of beginning;

Thence due north to the point of beginning.

Southern Area:

From a point on the section line between sections 21 and 22, T. 20 N., R. 7 E., at which said line intersects the ridge between Garcia Canyon and Chupaderos Canyon;

Thence northwesterly, westerly and southwesterly along said ridge to a point near the northwest corner of section 26, T. 20 N., R. 6 E.;

Thence due south to the mountain ridge immediately north of Guaje Canyon;

Thence westerly and northwesterly along said ridge to a point on Caballo Mountain at which said ridge line intersects the south boundary of the

Santa Clara Indian Reservation;

Thence east, north, east, north, east, south, easterly, south, and easterly along the boundary of the Santa Clara Reservation to the northeast corner of section 21, T. 20 N., R. 7 E.;

Thence south along the section line between sections 21 and 22, T. 20 N., R. 7 E., to the point of beginning.

5. Indian Title Lands Included in Taylor Grazing District. Pursuant to section 1 of the Taylor Grazing Act, 43 U.S.C. §315, the acting Secretary of the Interior on June 12, 1941, issued an order establishing Grazing District No. 1 in the State of New Mexico. The order was published on June 21, 1941, in volume 6 of the Federal Register starting at page 3040, and according to its terms became effective on that date. The following portions of the aboriginal title lands of the plaintiffs, described above in Finding No. 2, were by said order placed in such grazing district:

San Ildefonso

All those lands of said plaintiff lying east of the Rio Grande, except those parcels, if any, previously patented to

others or subsequently patented to others on the basis of entries or other claims initiated prior to June 21, 1941.

Santo Domingo

All those lands of said plaintiff lying east of the Rio Grande, except those parcels, if any, previously patented to others or subsequently patented to others on the basis of entries or other claims initiated prior to June 21, 1941.

Santa Clara

All those lands of said plaintiff in T. 20 N., Rs. 8 and 9 E., lying east of the west boundary of the Santa Clara Pueblo Grant, and all those in T. 21 N., R. 8., except, in the case of each of said townships, those parcels, if any, previously patented to others or subsequently patented to others on the basis of entries or other claims initiated prior to June 21, 1941.

6. Enlargement of Grazing District No. 1 to Include Additional Lands of Santa Clara Pueblo. Pursuant to section 1 of the Grazing Act, the Secretary of the Interior on December 4, 1944, issued an order which enlarged Grazing District No. 1 of New Mexico. Said order was filed with the Federal Register on December 14, 1944, and became effective immediately. It was

published on December 15, 1944, at 9 Fed. Reg. 14,650. Said order placed in the grazing district all the aboriginal title lands of plaintiff Pueblo of Santa Clara (except those previously patented, or subsequently patented on the basis of previously initiated entries or other claims) in the following described areas:

T. 20 N., R. 7 E.:

sec. 1: N 1/2
sec. 22
sec. 23: S 1/2
sec. 24: S 1/2
sec. 25: lots 1, 2, 3, 4, N 1/2, and N 1/2 S 1/2
sec. 26: lots 1, 2, N 1/2, SW 1/4, and N 1/2 SE 1/4
sec 27

T. 20 N., R. 8 E.:

sec. 6: lots 4, 5, 6, and 7
sec. 19: lots 8, 9, 10, and 11
sec. 30: lots 2, 3, 4, 5, 8, 9, 10, and 11

T. 21 N., R. 7 E.:

secs. 21 to 28 inclusive
secs. 33 to 36 inclusive

7. No Payment of Compensation. The defendant has not paid any compensation for or on account of any of the dispositions of the plaintiffs' lands described in Findings 3, 4, 5, and 6 above.

8. Conclusion -- Applicability of

Clause 4 of Section 2 of Indian Claims Commission Act. The transactions described in Findings 3, 4, 5, and 6 above, constituted "takings by the United States. ..of lands owned or occupied by" these plaintiffs "without the payment for such lands of compensation agreed to by the claimant," all within the meaning of Clause (4) of Section 2 of the Indian Claims Commission Act (25 U.S.C. §70a (4)).

9. Conclusion -- Liability. The defendant is liable to each plaintiff for taking of so much of that plaintiff's aboriginal title land, described above in Finding No. 2, as was disposed of in the transactions described in Findings 3, 4, 5 and 6. Each plaintiff is entitled to recover from the defendant the fair market value of its respective lands so taken as of the appropriate valuation date given hereinbelow in Finding 10, less such offsets, if any, to which the defendant may be entitled under the Indian Claims Commission Act.

10. Conclusion -- Taking Dates.

(a) The plaintiffs' lands taken by the defendant's action in conveying them to third parties are to be valued as of the dates of entry, or, for mineral claims,

patent dates; but since many dates are involved, the parties, to avoid the burden of valuing each separate tract as of a different date, may agree on an average valuation date or dates for various groups of entries.

(b) The plaintiffs' lands taken by being placed in the Jemez Forest Reserve are to be valued as of October 12, 1905.

(c) The plaintiffs' land taken by being placed in Grazing District No. 1 by the order of June 12, 1941, are to be valued as of June 21, 1941.

(d) The plaintiff Santa Clara's lands taken by being in Grazing District No. 1 by the order of December 4, 1944, are to be valued as of December 14, 1944.

San Felipe Reservation

The following findings are applicable only to Docket 355, Pueblo of Santo Domingo:

11. Santo Domingo - San Felipe Spanish Grant. On September 10, 1770, representatives of the Pueblo of Santo Domingo and of its neighboring pueblo, San Felipe, presented a petition to the Spanish Governor and Captain General of New Mexico. The most pertinent part of the petition reads as follows:

> . . . That whereas we have some horned cattle, sheep and goats, and also herds of horses for the service of the King our Master (whom may God preserve) and not

> having sufficient lands on which to pasture the same; therefore we humbly request that your Excellency be pleased to cede to us in grant, in the name of the King our Master, whom may God preserve, a piece of land situate on the East side of the Rio del Norte [Rio Grande], surplusage of each Pueblo, and bounded on the North by Lo de Vasques, on the South by the small spring of water called the bear spring, on the East, an ancient Pueblo called the Tunque Pueblo, and the West, the Rio del Norte, which piece of land comprises from North to South and from East to West, three quarters of a league.

On the same day the Spanish Governor and Captain General executed a document stating in pertinent part:

> . . . in view of the lands they ask in grant lying between the two Pueblos and that it would be very prejudicial to them should they be granted to any other individual: and the natives of the two Pueblos having been and are at all times ready to render to the King any service required of them, I, the said Governor and Captain General said, that I would grant in the name of his Majesty (whom may God preserve) the piece of land they apply for, equally between one and the other Pueblo, so that a league being measured to the South from the Pueblo of Santo

> Domingo, and another to the North of San Felipe, in the middle of the cultivable lands remaining, permanent landmarks shall be placed, in order that each Pueblo may observe its limits; and as respects the remaining pasture and wood lands, they shall be common to both of the aforesaid Pueblos, equally and without any preference. . .

By the same document the Spanish Governor and Captain General commissioned and empowered one Bartolome Fernandez, "chief alcalde and war captain of Santo Domingo and San Felipe," to "place the natives of the aforesaid two Pueblos in Royal and personal possession thereof."

On September 20, 1770, Don Bartolome Fernandez went out on the land in question with the "principal Indians and authorities of the said Pueblos of Santo Domingo and San Felipe," read the grant, measured the ground, designated it to the Indians, and took them by the hand and conducted them over it, whereupon they "pulled up grass, threw stones to the four cardinal points and we all shouted in a loud voice three times, long live our King and master, whom may God preserve. . ."

12. Extent of Pueblo Claim Under the Joint Grant. While the 1770 grant was

never surveyed, so that in 1898 the Santo Domingo and San Felipe Indians were not aware of the exact amount of land included therein, both Pueblos considered that the grant included at least the lands lying between the eastern boundary of the San Felipe Pueblo Grant of 1689 and the Tonque Pueblo ruins north of the Arroyo Tonque, and both Pueblos used these lands in common for pasture and for other purposes from 1770 until they were reserved by Executive order for the San Felipe Indians in 1902. This 8,600 acre area is delineated on the map prepared by the Bureau of Land Management which accompanies the stipulation of the Pueblo of Santo Domingo referred to in Finding 1 above. It is more fully described as follows:

> From a point in Section 27, T. 14 N., R. 5 E., where the eastern boundary of the San Felipe Pueblo Grant intersects the Arroyo Tonque due north along the east boundary of the San Felipe Pueblo Grant to the southern boundary of the Santo Domingo and San Felipe Grant:
>
> Thence due east along the southern boundary of the Santo Domingo and San Felipe Pueblo Grant to the south boundary of the Santo Domingo Pueblo Grant;

Thence southeasterly along the south boundary of the Santo Domingo Pueblo Grant to the range line between Range 5 East and Range 6 East;

Thence due south along the range line between Range 5 East and Range 6 East to the Arroyo Tonque;

Thence northwesterly along the Arroyo Tonque to the point of beginning.

13. Use and Occupancy of Joint Grant Lands to 1902. Within the memory of Santo Domingo Indians alive in 1954, the area set aside in 1902 for the San Felipe Indians was used by the Santo Domingo Indians jointly and amicably with the San Felipe Indians. The Santo Domingos used the entire area to pasture their communal horse herd, watering the horses at Tonque Spring. This spring is also a sacred shrine of Santo Domingo, heavily visited by the pueblo people. Near the Arroyo Tonque, the Santo Domingos gathered red coloring clay and shell-like rock for use in making and decorating pottery.

14. Proceedings in the Court of Private Land Claims. In March 1893 the Pueblos of Santo Domingo and San Felipe filed a joint petition in the Court of Private Land Claims for confirmation of the 1770 grant. The case proceeded to a

hearing on June 23, 1898. The court held that the grant was genuine, but by a three to two decision construed the description to include only about 1,100 acres. On January 6, 1899, the Special Pueblo Attorney requested that the appeal be taken at the expense of the United States "as the said Pueblos can ill afford the same and should be protected in their rights especially in a case such as this." The appeal to the Supreme Court was docketed on July 25, 1899. However, the Indian Department appropriation act for the fiscal year beginning July 1, 1900, failed to contain an item for the salary of a Special Pueblo Attorney. On November 14, 1900, the case came on to be heard in the Supreme Court, and the Indians "having been three times solemnly called by the Marshall to come into Court and prosecute their appeal. . ." failed to appear. Upon the motion of the United States of America, the defendant herein, the appeal was dismissed.

15. Background of the Establishment of the San Felipe Indian Reservation. On April 8, 1901, one Julio Garduno filed under the Homestead Act with respect to 147.90 acres of land in Section 19, Township 14 North, Range 5 East, lying largely

within the 8,600 acre area described in Finding No. 12. Almost immediately, W.H. Pope recognized the threat presented to the Indians' use of the lands which they had claimed, used and occupied for many years. Pope had previously defended the United States against the Pueblos in the proceedings before the Court of Private Land Claims. Pope wrote on May 13, 1901, to the Commissioner of Indian Affairs, noting that the land taken up by Garduno had actually been occupied and cultivated by the Indians and that because of evidence of coal in the vicinity the lands claimed by the two Pueblos, but not confirmed by the Court of Private Land Claims, would soon be entered, thus leading to controversies between "the entry men claiming under the United States and the Indians claiming under their ancient possession." Pope urged that the unconfirmed portion of the lands claimed under the 1770 grant, including the 8,600 acres described in Finding No. 12 be withdrawn from entry. By so doing, Pope added, it would make possible an additional reservation covering "the ancient Indian possession" of the Indians "who are, I may add, among the most populous and prosperous of the Pueblos

of New Mexico."

16. Withdrawal of Claimed Area. As suggested by Pope, these lands were withdrawn from entry and on April 25, 1902, the Secretary of the Interior directed the Commissioner of Indian Affairs to determine the need for the proposed permanent additional reservation for the use and occupancy of the Santo Domingo and the San Felipe Pueblos.

17. Investigation of Need for Reservation. On April 17 and 18, 1902, Ralph Collins, Superintendent of the Albuquerque Indian School, and Mr. Pope visited the land in question. In a report, dated May 2, 1902, to the Commissioner of Indian Affairs Pope stated that "the land in question has been of great use to the Pueblos named" (Santo Domingo and San Felipe) and noted that the Indians had maintained their claims to the area by notifying Garduno that he had settled on their land and that Garduno had departed after their visit and made no further effort to occupy to the premises. Garduno had ". . . no equities which commend him to the Government, certainly none as against the Indians who have had possession of these lands for a very long time."

Similarly, Collins reported on May 9, 1902, that by his homestead entry Garduno ". . . is clearly trying to usurp some of the farming land and water rights which the Indians have claimed, used and occupied for a long time. . . The Indians make their living entirely from their farming and stock raising, using the land next to the river which is under irrigation for farming and that adjoining the river bottom which is high and rolling and broken for stock grazing."

18. Exclusion of Santo Domingo Indians. Following their April visit both Collins and Pope recommended a reservation for the San Felipe Indians alone. Pope explained the reason for this recommendation in his May 2, 1902 report: "The Santo Domingos have already a very large holding and an amount of land entirely adequate for their purposes." He also wrote, ". . . if the Land Department prefers to make the reservation in favor of the pueblos jointly, I am of opinion that it will not lead to any serious complication as the two pueblos live in comparative amity."

19. Establishment of San Felipe Reservation. Acting on the recommendation

of Collins and Pope, the Acting Commissioner of Indian Affairs on May 28, 1902, recommended that the reservation he made for the Pueblo of San Felipe, alone, "as the Santo Domingo Pueblo has already sufficient lands for its requirements." On June 13, 1902, President Theodore Roosevelt by Executive order set apart a tract of land including the lands described in Finding No. 12 "as a reservation for the use and occupancy of the Pueblo Indians of New Mexico belonging to the Pueblo of San Felipe. . ."

20. Joint Aboriginal Occupancy by Santo Domingo and San Felipe Indians. From at least 1770 down to June 13, 1902, the Santo Domingo Indians and the San Felipe Indians had used and occupied the 8,600 acres of lands involved herein in common. The Santo Domingo Indians and San Felipe Indians speak the same language. Santo Domingo traditionally maintained close and friendly ties with the Pueblo of San Felipe, the closest ties which it maintained with any Pueblo. Santo Domingo Indians and San Felipe Indians intermarried. Santo Domingo medicine men traditionally visited San Felipe and participated in initiations and other ceremonies. Indians

from these two Pueblos frequently participated in each other's dances and borrowed paraphernalia. This friendly relationship extended to the mutual use and occupancy of these lands.

21. Conclusion -- Extinguishment of Indian Title. As of June 13, 1902, the Pueblo of Santo Domingo held an undivided one-half Indian title interest in 8,600 acres set aside on that date as a reservation for the San Felipe Indians without compensation to Santo Domingo. By this reservation the United States extinguished the interest of the Santo Domingo Indians in these lands.

22. Conclusion -- Liability. The Pueblo of Santo Domingo is entitled to recover from the defendant one-half of the fair market value of the 8,600 acres described in finding No. 12 as of June 13, 1902, less such offsets, if any, to which the defendant may be entitled under the Indian Claims Commission Act, 60 Stat. 1049.

/s/
John T. Vance,
Commissioner

/s/
Richard W. Yarborough,
Commissioner

/s/
Margaret H. Pierce,
Commissioner

/s/
Brantley Blue,
Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SANTO DOMINGO, Plaintiff,	)	
v.	)	Docket No. 355
THE UNITED STATES OF AMERICA, Defendant.	)	

INTERLOCUTORY ORDER

Based upon the findings of fact and opinion this day entered herein, which findings of fact and opinion are hereby made a part of this order, the Commission concludes as a matter of law that:

1. The plaintiff has the right and capacity to assert its claim herein.

2. At the time American sovereignty attached to New Mexico, pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, the plaintiff had aboriginal title to the tracts of land described under its name in the Commission's finding of fact "2".

3. The United States, without payment of any compensation, on various dates, extinguished the aboriginal title to various parcels within each of the aforesaid tracts by patenting said parcels to third

parties. For such parcels the date of taking is the date of entry in the case of nonmineral entries, and the date of patent in the case of mineral claims and entries.

4. On October 12, 1905, the United States without payment of any compensation extinguished the aboriginal title of the plaintiff to the parcels described in the Commission's finding of fact "4".

5. On June 21, 1941, the United States without payment of any compensation extinguished the aboriginal title of the plaintiff to the parcel described under its name in the Commission's finding of fact "5".

6. One June 13, 1902, and for a long time prior thereto, plaintiff Pueblo of Santo Domingo held an undivided one-half Indian title interest in the tract of land described in the Commission's finding of fact "12." On that date the United States extinguished said interest without payment of any compensation.

IT IS ORDERED that this case shall now proceed to a determination of the fair market value of the various parcels to which plaintiff's aboriginal title was extinguished as of the appropriate date

for each parcel, as above specified. To avoid the burden of valuing each separate parcel disposed of to a third party as of a different date, the parties may agree on an average valuation date or dates.

Dated at Washington, D.C., this 9th day of May, 1973.

/s/
John T. Vance,
Commissioner

/s/
Richard W. Yarborough,
Commissioner

/s/
Margaret H. Pierce,
Commissioner

/s/
Brantley Blue,
Commissioner

APPENDIX G

Opinion of the Court of Claims,
Pueblo of San Ildefonso, et al.,
v. United States, dated
April 16, 1975

The UNITED STATES

v.

PUEBLO OF SAN ILDEFONSO et al.

No. 7-73

United States Court of Claims.

April 16, 1975.

S. Bobo Dean, Washington, D.C., for appellees; Darwin P. Kingsley, Jr., and Karelsen & Karelsen, New York City, attorneys of record for appellees; Richard Schifter and Fried, Frank, Harris, Shriver & Kampelman, Washington, D.C., of counsel.

A. Donald Mileur, Washington, D.C., with whom was Asst. Atty. Gen. Wallace H. Johnson, for appellant; Roberta Swartzendruber, Washington, D.C., of counsel.

Before DURFEE, Senior Judge, and DAVIS and SKELTON, Judges.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

DURFEE, Senior Judge:

These cases are before the court on an interlocutory appeal by the Government

from a decision of the Indian Claims Commission, rendered on May 9, 1973, and reported in 30 Ind.Cl.Comm. 234 (1973). The three Indian pueblos of San Ildefonso, Santo Domingo and Santa Clara filed claims with the Commission, pursuant to clause 4 of Section 2 of the Indian Claims Commission Act,[1] to recover compensation for the extinguishment of aboriginal title to their lands in northern New Mexico. Each pueblo's claim is separate and distinct; the claims are not consolidated, but have proceeded together for convenience in dealing with common issues.

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[1] Title 25 U.S.C. §70a(1970) provides, in pertinent part, as follows:

"The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; * * *."

The first issue we are asked to pass upon is whether the Claims Commission erred in ascertaining the dates on which the United States extinguished Indian title to appellees' ancestral lands. Prior to trial the parties entered into stipulations whereby it was agreed that each of the pueblos aboriginally and exclusively used and occupied certain areas delineated on maps by the Bureau of Land Management; it was further agreed that the United States is liable to each of the pueblos for extinguishing aboriginal title to those lands. Trial was held to determine the date or dates of "taking." Evaluating all the evidence, the Commission found that extinguishment of appellees' aboriginal occupancy areas was effected by (1) conveyances under the public land laws to various grantees at different times; (2) inclusion in the Jemez Forest Reserve;[2] and (3) inclusion

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[2] By proclamation of October 12, 1905, President Theodore Roosevelt established the Jemez Forest Reserve under the authority of section 24 of the Act of March 3, 1891, ch. 561, 26 Stat. 1103, as amended 16 U.S.C. §471. By Executive Order of President Wilson, dated April 16,

in New Mexico Grazing District No. 1 created under the Taylor Grazing Act.[3] The lands conveyed to third persons under publi land laws were held to have been "taken" as of the dates of entry (or, for mineral claims, as of the patent dates). The vario parcels of Indian title lands included in the Jemez Forest Reserve were held "taken" on October 12, 1905, the date the Reserve was created. The areas placed within the Taylor Grazing District were held "taken" on June 12, 1941, the date the district was established.[4] The Government urges us to set aside these determinations and to substitute its recommended taking dates for those found by the Commission.

The second issue presented is whether

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[2] (con't) 1915, it was merged with the Pecos National Forest and the combined forest was named Santa Fe National Forest.

[3] Grazing District No. 1 in the state of New Mexico was established by order of the Secretary of the Interior on June 12, 1941, issued under the authority of section 1 of the Taylor Grazing Act, 43 U.S.C. §315. See 6 Fed. Reg. 3040 (1941).

[4] Certain areas of aboriginal title lands in the Santa Clara case which were not included in the original district were brought in by an order extending the district boundaries on December 14, 1944,

the Commission erred in holding that the pueblo of Santo Domingo (plaintiff in Docket No. 355) is entitled to recover compensation for the extinguishment of its Indian title interest in a certain 8,600-acre tract of land. The Commission's holding is based upon a finding that the pueblo of Santo Domingo and the pueblo of San Filipe held "joint aboriginal title" to this tract prior to June 13, 1902, when it was set aside by Executive Order for the exclusive use of the San Filipe Indians. The Government attributes legal error to the Commission's reliance upon the principle of "joint aboriginal title;" it also challenges the sufficiency of the evidence to support the conclusion that the two Indian pueblos had exclusive use and possession of the 8,600-acre tract for a long period of time prior to 1902.

For the reasons which follow, we sustain the determinations of the Commission in all respects.

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4 (con't) and that date was held to be the proper valuation date for those areas.

I. Dates of Taking

Dissatisfied with the valuation dates set down by the Commission, the Government has submitted two alternative theories as to when Indian title to appellees' aboriginal lands was extinguished. The first argument is that Congress manifested an intent to abolish aboriginal ownership to the lands in question by passage of the Act of July 22, 1854, 10 Stat. 308, and the Act of December 22, 1858, 11 Stat. 374. The Government's alternative position is that non-Indian interference with the appellees' exclusive use and occupancy of aboriginal title areas was so substantial by 1905 as to effectuate the destruction of aboriginal ownership no later than that year.

[1-3] The task of setting a date for the extinguishment of Indian title must be approached with certain fundamental principles in mind. The threshold rule, of course, is that termination of Indian title is exclusively the province of the United States. Oneida Indian Nation of New York v. County of Oneida,

414 U.S. 661, 669, 94 S. Ct. 772, 39 L.Ed.2d 73 (1974); United States v. Santa Fe Pacific RR, 314 U.S. 339, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586, 5 L.Ed. 681 (1823). And in this regard, the "power of Congress * * * is supreme." Santa Fe, supra, 314 U. S. at 347, 62 S.Ct 248. Another familiar principle is that the time fixed for the "taking" of specific lands depends upon the particular facts, circumstances and history of each case. See Santa Fe, supra, 314 U.S. at 357-358, 62 S.Ct. 248. This court was compelled to give emphasis to this rudimentary point in its recent decision in Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 946, 203 Ct.Cl. 426, 446 (1974), and Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386, 1389, 204 Ct.Cl. 137, 142 (1974), cert. denied Nov. 18, 1974. An additional doctrine embedded in Indian jurisprudence, observed by the Supreme Court in the Santa Fe case, is that "* * * an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of

its Indian wards." Id. 314 U.S. at 354, 62 S.Ct. at 255. These principles are the essential benchmarks which serve to guide our assessment of the Government's recommended dates of taking.

The Government says that Congress manifested an intent to extinguish appellees' aboriginal title in 1858. The starting point of the Government's analysis is the Act of July 22, 1854, 10 Stat. 308. By section 8 of that enactment Congress directed the Surveyor General for New Mexico "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico"; and to "make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo * * * denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States"; and further to "make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each,

stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the lands." The Act also provided that the "report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty* * *."

The Surveyor General submitted his report, dated September 30, 1856, wherein he recommended approval of the claims of some 13 pueblos (including those of the pueblos involved in this action) to lands granted by prior sovereigns. These pueblo land grants were subsequently confirmed by Congress by the Act of December 22, 1858, 11 Stat. 374, and patents were authorized to issue "* * * as in ordinary cases to private individuals * * *." It is the Government's contention that the 1858 Congressional confirmation of these grants extinguished the aboriginal title of the pueblos to all outlying areas. Reliance is placed upon the Santa Fe decision of the Supreme Court, supra, where it was held that the creation in 1883 of the Walapais Indian Reservation at the request of the Walapais, and its accep-

tance by them, amounted to relinquishment of any tribal claims which they might have had to lands outside the reservation. The Government also directs our attention to numerous cases wherein the Claims Commission has held that the establishment of a reservation for an Indian tribe constitutes a relinquishment of aboriginal title claims outside of the reservation. It is argued that the 1858 Congressional confirmation of the grants of prior sovereigns was tantamount to the creation of a reservation for the pueblo Indians, and that Congress thereby manifested an intent to extinguish aboriginal title to all areas outside the boundaries of the confirmed grants.

[4] It should be clear by now that the creation of an Indian reservation does not invariably extinguish aboriginal title claims to outlying areas. In Santa Fe, supra, the Supreme Court dispelled any notion that the establishment of a reservation automatically destroys Indian title claims based upon aboriginal ownership. See, id., 314 U.S. at 351-56, 62 S.Ct. 248. As this court has most recently stated in Gila River, supra,

494 F.2d at 1390, 204 Ct.Cl. at 144: "[t]here is no Procrustean rule that the creation of a reservation rigidly stamps out aboriginal rights." The particular facts and circumstances surrounding the establishment of a reservation in a given historical context may be such that that event will be deemed to have constituted a relinquishment of tribal claims to lands outside the reservation. But the rule to be followed, as succinctly and well stated by the court in Turtle Mountain Band, supra, 490 F.2d at 946, 203 Ct.Cl. at 446, is that "* * * Indian settlement on a reservation should be seen as an abandonment of claims only when the specific circumstances warrant that conclusion."

[5,6] In the instant case, there is no indication that Congress had in mind the extinguishment of the pueblos' aboriginal ownership rights when it passed the Act of December 22, 1858. The sole purpose for that legislation was to formally approve and sanction the bona fide grants of prior sovereigns, and to authorize the issuance of patents therefor. Contrary to the Government's contention, the Act of December 22, 1858, did not "give" any

lands to these pueblo Indians, but merely validated title to lands which the pueblos already owned. The United States was obliged under principles of international law to confirm the bona fide grants of prior sovereigns in order to give effect to the 1848 treaty with the Republic of Mexico. See Treaty of Guadalupe Hidalgo, Art. viii, 9 Stat. 922, 929 (1848); Beard v. Federy, 70 U.S. (3 Wall.) 478, 491-92, 18 L.Ed. 88 (1866). Thus the circumstances in this case are significantly different from the situation where the Government sets aside land for the establishment of an Indian reservation without any legal duty to do so. We agree with the conclusion of the Claims Commission that "[t]o hold, in these circumstances, that the plaintiffs' acceptance of the patents extinguished their aboriginal title to outlying areas would be equivalent to stating the United States made them pay for what they already owned and what it was already solemnly obligated to confirm." 30 Ind.Cl.Comm. at 239. Nowhere is there to be found any implication that Congress intended to exact the relinquishment of the pueblos' aboriginal rights as the

price for confirming their land grants from prior sovereigns. Nor, turning the coin around, is there any proof that the pueblo Indians agreed to abandon aboriginal claims in their ancestral homeland by accepting the patents issued in confirmation of these grants. Indeed, the Commission specifically noted the Government's failure to show any actual abandonment in 1858 of lands previously used. 30 Ind.Cl.Comm. at 240.

As mentioned earlier, we are bound not to violate the Supreme Court's proscription against lightly implying an extinguishment of aboriginal title. See Santa Fe, supra, at 354. Since the Government has failed to adequately show that the 1858 confirmation of prior land grants was intended by Congress to extinguish Indian title lands outside the boundaries of the confirmed grants, or that the pueblo Indians agreed to renounce their aboriginal claims by accepting patents issued in confirmation of those grants, we cannot say that the Commission erred in refusing to adopt the Government's recommended 1858 date of taking. Cf. Turtle Mountain Band, supra, 490 F.2d

at 947, 203 Ct.Cl. at 447.

In an attempt to bolster its suggested taking date, the Government argues that after 1858 the Congress and the Executive Branch dealt with the pueblo aboriginal areas as part of the public domain. As evidence of this, the Government observes that all areas outside of those claimed under Mexican and Spanish grants (by Indian pueblos and by others) were opened up to white settlement by section 7 of the Act of July 22, 1854, 10 Stat. 308. Actual entries onto the pueblos' aboriginal areas did not occur, however, until 1870 and thereafter.

[7] It will be observed, first of all, that during the second half of the 19th century, the national policy of respecting unextinguished aboriginal title was in effect in New Mexico. On May 31, 1884, the General Land Office adopted a circular instructing its field officers "to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value

whatever thereon."[5] When the circular was reissued in 1887, and again in 1903, it applied with respect to "* * * lands in the possession, occupation and use of Indian inhabitants, or covered by their homes and improvements."[6] The circular was made expressly applicable to "every land district * * * in any part of the public-land States and Territories." Moreover, when Congress established the Court of Private Land Claims in 1891 to pass on the validity of alleged Spanish and Mexican grants in New Mexico, it provided:

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[5] See 3 Lands Decisions 371 (1884).

[6] See 6 Lands Decisions 341 (1887); Circulars and Regulations of the General Land Office, United States Government Printing Office, Washington: 1930, pp. 651-52; 43 C.F.R. § 2013.6 (1970). Contrary to the Government's assertion, the 1887 and 1903 circulars are not limited in application to lands on which improvements have been made.

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place [Act of March 3, 1891, c. 539, 26 Stat. 860].

It is our view that the Commission correctly concluded that there was no intent during the last half of the 19th century to make all of appellees' aboriginal areas legally open to entry.

[8-12] But even if the aboriginal title areas of these pueblos were open to entry, it does not automatically follow that Indian title was destroyed prior to actual entries upon the various tracts of land. We know that the process of surveying lands and performing other deeds in anticipation of future white settlement does not itself affect Indian title. Plamondon v. United States, 467 F.2d 935, 937-38, 199 Ct.Cl. 523, 528-29, (1972). Nor is the bare expectation that lands will be settled sometime in the future sufficient to deprive Indian dwellers of their aboriginal rights. Gila River, supra, 494 F.2d at 1391, 204 Ct. Cl. at 145; Cf. Lipan

Apache Tribe v. United States, 180 Ct. Cl. 487, 494 (1967). Making lands available for white settlement could, of course, in an appropriate factual context, constitute termination of aboriginal ownership. See Gila River, supra, 494 F.2d at 1391, 204 Ct. Cl. at 146. But that result does not obtain in the present case. The opening of lands ceded by Mexico to white settlement was merely an act in recognition of the inevitable western migration and eventual settlement of white homesteaders. This formal acknowledgement that the territory acquired from Mexico would sooner or later be used and occupied by migrating white settlers does not translate into a present intention on the part of Congress to destroy Indian title. Nor does the opening of these lands to settlers under the public land laws signify, as the Government would have it, that Congress intended the 1858 confirmation of the pueblo land grants to effectuate the extinguishment of the Indians' aboriginal

ownership rights. There is simply an insufficient factual basis in the record for the Government to draw persuasive support for its 1858 taking date from the fact that large areas of land acquired from Mexico were thrown open to white settlement.

This brings us to the Government's second and alternative theory as to when appellees' Indian title was extinguished. The argument is that by 1905 the interruption of non-Indians - caused by white settlement under the public land laws together with land grants to non-Indians by prior sovereigns - had constituted such a "serious intervention" with the appellees' exclusive use and occupancy of their aboriginal title areas so as to effectuate an extinguishment over the entire area.

[13] The first point to be made, of course, is that there are no

fine spun or precise formulas for determining the end of aboriginal ownership. Unquestionably, the impact of authorized white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost. But such authorized settlement is only one of various factors to be considered in determining when specific lands were "taken." Gila River, supra, 494 F.2d at 1391, 204 Ct. Cl. at 146.

The Government placed in evidence certain maps and excerpts from the records of the Bureau of Land Management showing the claims, applications, and entries on file prior to 1906. On the basis of all the evidence, the Commission found that there were fairly numerous intrusions into the western part of the San Ildefonso area and the southern and extreme eastern parts of the Santo Domingo area; that they consisted largely of coal declaratory statements and mineral entries; that in each case the parcels

adversely claimed make up much less than one-half of the total acreage; that in the case of Santa Clara, there was intrusion into only one fractional section at the extreme northeastern corner of the aboriginal title area; and that the witness who compiled the maps and excerpts was unable to state which claims and entries went to patent, and which were cancelled, rejected, or abandoned. These determinations are not challenged on appeal. In view of the acknowledged national policy of respecting unextinguished Indian title, which was in effect in New Mexico, and in the absence of any clear and convincing evidence of an intent to extinguish the property rights of the friendly farming Indians of the Southwest, the Commission inferred an intent on the part of the United States to protect the rights of these pueblo Indians, 30 Ind.Cl.Comm. at 242. Further, the Commission concluded, in the circumstances here involved, that the fact that some entries were allowed in the plaintiffs' aboriginal areas is evidence of official negligence, or lack of knowledge of the plaintiffs' areas, rather than of an intent on the part of the United States to abolish their whole titles. 30 Ind.Cl.Comm.

at 242. Accordingly, the Commission rejected the Government's theory that the appellees' Indian title to their entire aboriginal areas was extinguished by 1905.

[14] The evidence presented to the Commission has been carefully examined, and the Government's argument in support of its proffered 1905 taking date has received serious consideration. We find ourselves in agreement with the Claims Commission that the Government failed to show the destruction of Indian title over appellees' entire aboriginal regions by 1905. Considering the various factors involved - including the extent of authorized settlement in the pueblos' aboriginal areas between 1870 and 1905 (together with the confirmed grants awarded by prior sovereigns), the declared policy in New Mexico of protecting unextinguished Indian title, the absolute dearth of evidence indicating an express Congressional purpose to abolish Indian title over the whole of appellees' ancestral homelands, and the lack of any clear and convincing evidence from which to imply an intent to terminate the pueblos' entire aboriginal ownership - we are unable to conclude that appellees'

aboriginal ownership was completely extinguished by the year 1905. On the basis of the record before us, we cannot say that the Commission erred in refusing to select the Government's suggested 1905 valuation date.

As previously mentioned, the Commission ascertained that appellees' aboriginal lands were "taken" on the following occasions: (1) The several dates on which third persons entered lands conveyed to them under the public land laws (or the patent dates, with respect to mineral claims); (2) October 12, 1905, the date on which the Jemez Forest Reserve was created and various parcels of Indian title land were included therein; and (3) June 12, 1941, the date on which pueblo areas were placed within the New Mexico Grazing District No. 1.

The Government attacks the method by which the Commission has determined when Indian title to the pueblo lands was extinguished. Specifically, the Government objects to the selection of the "multitude of scattered dates" when entries were made onto areas under the public land laws. The Government says

that Indian or aboriginal title, by its nature, is not divisible into sections or quarter-sections, and it is not subject to extinguishment on a piecemeal, checkered basis. We are asked to ascribe error to the Commission's approach.

[15-17] In each case, the Claims Commission weighs all the evidence and endeavors to determine at what point in time the United States extinguished aboriginal title to Indian lands. We must have a date (or dates) in order to place a value on the property taken, so that the Indian claimants can be compensated for the Government's past wrongs. The evidence in some cases will support a determination that at a specific point in time - on a date certain and definite - Congress clearly and unmistakenly manifested an intent to appropriate Indian lands and to wipe out all aboriginal rights. In other cases, the Congressional purpose is not so plainly exhibited; but the facts and circumstances in a given historical context may be such that the Commission, in its sound discretion, might reasonably and rationally choose a single date (or dates) as the most logical

time to infer confiscation by the Government of all aboriginal lands. In still other cases, such as the one before us, the record is devoid of any single occurrence or incident to serve as the event when the United States decisively and all at once grasped a tribe's aboriginal ownership rights in their entirety. The fact is, of course, that the Government repeatedly dealt with Indian lands on a piecemeal basis. In the instant case, the United States allowed and sanctioned - over a period of several decades beginning around 1870 - the intrusion of white settlers and miners onto appellees' aboriginal lands. The encroachment was gradual; the native Americans were displaced over a period of many years. In circumstances such as those presented here, it is entirely consistent with reality for the Commission to find that aboriginal lands were "taken" on the dates of the various entries under the public land laws. Confronted with this type of record, the Commission has resorted to practical solutions. The parties have been encouraged to confer and agree upon an "average" valuation date, or a series

of "average" dates, for the groups of dispositions made during successive periods. See 30 Ind.Cl.Comm. at 255. Such a procedure has received the sanction not only of this court, United States v. Northern Paiute Nation, 490 F.2d 954, 957, 203 Ct.Cl. 468, 473 (1974), but of the Supreme Court as well. Creek Nation v. United States, 302 U.S. 620, 622, 58 S.Ct. 384, 82 L.Ed. 482 (1938). Fixing a date for the extinguishment of Indian title is not always an exact process; in this area of the law, approximations must be tolerated. The determinations of the Commission - the body primarily charged with the administration of the Indian Claims Commission Act - should be given great weight if reasonable. Gila River, supra, 494 F.2d at 1393, 204 Ct.Cl. at 150.

[18] The dates chosen by the Commission in the present case find rational support in the record. In selecting the dates on which third persons entered Indian lands under the public land laws - and in choosing the patent dates for mineral claims - the Commission has not overstepped the limits of its permissible discretion. We are satisfied that these

dates, as well as the dates when aboriginal areas were included in the Jemez Forest Reserve and the New Mexico Grazing District No. 1, should serve as the applicable taking dates for determining the value of appellees' former lands.

II. The San Filipe Indian Reservation

The Indian Claims Commission determined that the pueblo of Santo Domingo and the pueblo of San Filipe held "joint aboriginal title" to a certain 8,600-acre tract of land, and that the United States extinguished the Santo Domingo one-half interest in the land on June 13, 1902, by the establishment of an Executive Order reservation for the exclusive use of the San Filipe Indians. The Commission concluded, accordingly, that the pueblo of Santo Domingo is entitled to recover compensation from the United States in an amount equal to one-half of the fair market value of the 8,600 acres as of June 13, 1902.

It is appropriate to briefly recite certain historical facts and events which pertain to the land area in question. On September 10, 1770, representatives of the neighboring pueblos of Santo Domingo and

San Filipe submitted a joint petition to the Spanish Governor and Captain General of New Mexico seeking to obtain a land grant from the Spanish Crown. It stated in pertinent part:

> * * * That whereas, we have some horned cattle, sheep and goats, and also herds of horses for the service of the King our Master (whom may God preserve) and not having sufficient lands on which to pasture the same; therefore we humbly request that your Excellency be pleased to cede to us in grant, in the name of the King our Master, whom may God preserve, a piece of land situate on the East side of the Rio del Norte, surplusage of each Pueblo, and bounded on the north by Lo de Vasques, on the South by the small spring of water called the bear spring, on the East, an ancient Pueblo called the Tunque Pueblo, and the West, the Rio del Norte, which piece of land comprises from North to South and from East to West, three quarters of a league * * *.

On the same day, the Spanish Governor and Captain General authorized a grant of the requested lands; and he executed a document which provided, in

pertinent part, as follows:

> * * * in view of the lands they ask in grant lying between the two Pueblos and that it would be very prejudicial to them should they be granted to any other individual: and the natives of the two Pueblos having been and are at all times ready to render to the King any service required of them, I, the said Governor and Captain General said, that I would grant and do grant in the name of his Majesty (whom may God preserve) the piece of land they apply for, equally between one and the other Pueblo, so that a league being measured to the South from the Pueblo of Santo Domingo, and another to the North of San Filipe, in the middle of the cultivable lands remaining, permanent landmarks shall be placed, in order that each Pueblo may observe its limits; and as respects the remaining pasture and wood lands, they shall be common to both of the aforesaid Pueblos, equally and without any preference * * *.

By the same document, the Spanish Governor and Captain General commissioned and empowered one Bartolome Fernandez, Chief Alcalde and War Captain of the Santo Domingo and San Filipe pueblos, to "give them possession in the customary form."

On September 20, 1770, Don Bartolome Fernandez entered onto the land in question together with the "principal Indians and authorities of the said Pueblos of Santo Domingo and San Filipe." Having read the grant, he measured the land and designated it to the Indians; he "gave them to understand that the pastures and watering places were to be in common to each one of the Pueblos and without preference to either of the Pueblos"; he "took them by the hand and conducted them over said land; they pulled up grass, threw stones to the four cardinal points and we all shouted in a loud voice three times, long live our King our Master, whom may God preserve * * *."

Since the lands which the two pueblos acquired from the Spanish Crown had never been surveyed, the exact extent of the 1770 grant was uncertain. The evidence in the record shows, however, that both groups of Indians understood the 1770 grant to encompass the 8,600 acres involved in this action, and that they used these lands in common for a long time. In 1898, the two pueblos jointly petitioned the Court of Private Land Claims to confirm their title to the land -

including the disputed 8,600 acres - which they believed had been conveyed to them by the 1770 grant. The Court unanimously held that the joint grant was genuine and entitled to confirmation. However, a majority of the Court would confirm only an 1,100-acre tract situated in the northern part of the claimed area. Two Justices dissented from this part of the decision, holding that the Indians were entitled to a much larger area.[7] It is important to note that the tract confirmed by the Court of Private Land Claims is contiguous to the 8,600-acre tract here in dispute.

Shortly after the termination of proceedings in the Court of Private Land Claims, there were attempted encroachments upon the lands claimed by the two pueblos to be within the limits of the 1770 joint grant. On April 8, 1901, a

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[7] An appeal was filed in the Supreme Court on behalf of the two pueblos but was dismissed for lack of prosecution when Congress failed to appropriate funds for the salary of a Special Pueblo Attorney.

Mexican named Julio Garduno made a homestead entry onto 147.90 acres of land lying largely within the 8,600-acre area involved in this action. The attorney who had represented the United States in the proceeding before the Court of Private Land Claims, W.H. Pope, wrote a letter on May 13, 1901, to the Commissioner of Indian Affairs, wherein he expressed his concern over the Garduno entry and other encroachments upon the lands being used by the two pueblos. Pope stated that while the Court of Private Land Claims was correct in confirming only 1,100 acres under the 1770 grant, the decision "undoubtedly leaves out a large amount of land that the Indians have claimed for many years." He pointed out that the lands taken by Garduno had been under the occupancy and cultivation of the Indians. Coal had been discovered in the vicinity, and it was Pope's belief that entries could be anticipated onto a large part of the premises claimed by the two pueblos but left out of their confirmation. "Should this be done," he observed, "it will be most unfortunate as it will lead to a number of controversies between

these entrymen claiming under the United States and the Indians claiming under their ancestral possession." Pope recommended that the unconfirmed portion of the lands claimed under the 1770 grant, including the 8,600 acres, be withheld from entry and further attempts to initiate or perfect title under the United States. It was suggested that the Department of Interior consider the question of a permanent reservation of these lands for the use and occupancy of the Santo Domingo and San Filipe pueblos.

The lands were temporarily withdrawn from entry and on April 25, 1902, the Secretary of the Interior instructed the Commissioner of Indian Affairs to investigate the matter of the proposed permanent reservation for the two pueblos. The investigation was conducted by Mr. Pope and one Ralph Collins, Superintendent of the Albuquerque Indian School Service, who together visited the lands in question in April of 1902. Both men recommended that the lands temporarily withdrawn for the use and occupancy of the two pueblos should be set aside for the creation of a permanent reservation

for the San Filipe Indians alone. In a report submitted to the Commissioner of Indian Affairs, dated May 2, 1902, Pope observed that "the land in question has been of great use to the Pueblos named" (Santo Domingo and San Filipe). He also stated that Garduno had "no equities which commend him to the Government, certainly none as against the Indians who have had possession of these lands for a very long time." The reason for suggesting the establishment of a reservation for the exclusive use of the San Filipe Indians was explained in the Pope report as follows:

> The Santo Domingos have already a very large holding and an amount of land entirely adequate for their purposes.

Pope also remarked that:

> If the Land Department prefers to make the reservation in favor of the pueblos jointly, I am of opinion that it will not lead to any serious complication as the two pueblos live in comparative amity.

On the basis of the Pope and Collins investigation, and upon their recommendation, the Acting Commissioner of Indian Affairs recommended that a

reservation be created solely for the pueblo of San Filipe "as the Santo Domingo Pueblo has already sufficient lands for its requirements." He also recommended that the Garduno entry be held for cancellation. On June 13, 1902, President Theodore Roosevelt signed an Executive Order setting apart the 8,600-acre tract of land here in issue as the San Filipe Indian Reservation.

In light of the above-recited record of events, and on the basis of the other evidence of record, the Commission found that the Santo Domingos and the San Filipes believed, based upon their interpretation of the Spanish grant of 1770, that they had joint title to what is now the San Filipe Executive Order Reservation, and that from at least 1770 down to June 13, 1902, both groups of Indians used and occupied this 8,600 acres of land in common. The Commission held that a true "joint aboriginal title" over these lands had been proven.

[19, 20] In order for an Indian claimant to prove aboriginal title, "[t]here must be a showing of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the

land." Confederated Tribes of the Warm Springs Reservation of Oregon v. United States, 177 Ct.Cl. 184, 194 (1966). Proof of these elements involves factual questions, and the findings of the Commission must be upheld on appeal if supported by substantial evidence. Six Nations v. United States, 173 Ct.Cl. 899 (1965); Red Lake, Pembina and White Earth Bands v. United States, 164 Ct.Cl. 389 (1964); Spokane Tribe of Indians v. United States, 163 Ct.Cl. 58 (1963); Sac and Fox Tribe of Indians v. United States, 315 F.2d 896, 161 Ct.Cl. 189, cert. denied, 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed.2d 165 (1963). The parties here have focused their attention, and ours, on the requirement of showing "exclusive" occupancy and control over the lands claimed.

[21-25] Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian

title, it must show that it used and occupied the land to the exclusion of other Indian groups. True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups. Ordinarily, where two or more tribes inhabit an area no tribe will satisfy the requirement of showing such "exclusive" use and occupancy as is necessary to establish ownership by Indian title. See e.g., Iowa Tribe of the Iowa Reservation in Kansas and Nebraska v. United States, 195 Ct.Cl. 365 (1971), cert. denied, 404 U.S. 1017, 92 S.Ct. 677, 30 L.Ed.2d 664 (1972); Six Nations, supra; Sac and Fox Tribe of Indians, supra. However, this court has acknowledged, on several occasions, that two or more tribes or groups might inhabit a region in joint and amicable possession without destroying the "exclusive" nature of their use and occupancy, and without defeating Indian title. Turtle Mountain Band, supra, 490 F.2d at 944, 203 Ct.Cl. at 442; Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, supra, 195 Ct.Cl.

at 370; Confederated Tribes of the Warm Springs Reservation of Oregon, supra, 177 Ct.Cl. at 194 n. 6; Sac and Fox Tribe of Indians, supra, 315 F.2d at 903, n. 11, 161 Ct.Cl. at 202 n. 11.

The Commission's reliance upon the principle of joint occupancy is assailed on two grounds. First, it is said that the pueblo of Santo Domingo and the pueblo of San Filipe were not a single or closely integrated entity and, therefore, as a matter of law, it was impossible for the two pueblos to have held joint Indian title. Second, it is argued that there are neither sufficient findings nor substantial evidence in this record to support a determination that the two pueblos jointly used and occupied the 8,600 acres in question for a long time.

[26] The Commission specifically found that the two pueblos were "separate entities," rather than a "super-entity" for the purpose of holding joint title to the subject tract of land. Four members of the Commission do not believe that a complete merger of two tribes into one entity is a prerequisite for applying the principle of joint occupancy.

30 Ind.Cl.Comm. at 355, n. 27. Chairman Kuykendall, on the other hand, who dissented in this aspect of the case, is of the opinion that "joint Indian title" can exist only where two or more tribes have become so closely allied or integrated in their land use and occupancy that they have in fact become virtually one land using entity. He does not believe that the concept is applicable to a situation where two separate entities, each possessing Indian title to its own lands, attempt to assert joint ownership to an area between their respective lands which is commonly used by both groups. 30 Ind. Cl.Comm. at 256-57. The Chairman's stated position is espoused by the Government here on appeal. There are no holdings of this court which say that two Indian tribes or groups, each a separate "entity" and each with its own separate lands, can never assert joint ownership to other lands which are commonly used and occupied. Seminole Indians of Florida v. United States, 455 F.2d 539, 197 Ct.Cl. 350 (1972), and Iowa Tribes, supra, do not stand for the proposition that two or more tribes claiming joint aboriginal title

must invariably and indispensably show that they have become, for all purposes, a "single land-owning entity." In Seminole Indians of Florida, supra, the issue of joint aboriginal title was not before the court. On the record before us in Iowa Tribes, supra, we held that the Iowas and the Sac and Fox may have used lands in common, but that the Commission could properly decide, on the basis of the evidence before it, that their occupancy was not proved to be truly joint, and therefore that each separate tribe's claims to Indian title would have to be tested on its own distinct basis. The Iowa Tribes decision did not purport to set down any rule that two or more tribes must first conclusively prove that they are a single or closely integrated entity before they can claim joint ownership of land. In our view, the Commission correctly held that the complete merger of two or more tribes into one is not a prerequisite for claiming joint aboriginal title.

[27] There is ample evidence in the record before us to support the conclusion that the pueblo of Santo Domingo

and the pueblo of San Filipe jointly used and occupied the disputed 8,600 acre tract for a long period of time.[8] We believe that the Commission could properly decide, on this record, that the two pueblos had "joint aboriginal title" at the time the lands were included in the San Filipe Executive Order Reservation. Both pueblos believed for a very long time that they owned the disputed area in joint tenancy under a 1770 land grant from the Spanish Crown. They asked the Court of Private Land Claims in 1898 to confirm that grant over the entire area in both of them jointly. By a narrow vote, the Court of Private Land Claims confirmed only the northern 1,100 acres, but that area is adjacent to the tract now in dispute and it formed an integral part of the larger tract which the Indians believed they owned in common. The factual picture which has emerged here adds up to significantly more than mere use and occupancy of a particular area by two or more tribes

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[8] The Government's attack upon the sufficiency of the Commission's findings is wholly lacking in merit.

at the same time. These two pueblos had a joint Spanish grant which they believed to encompass a large area, and although the Court of Private Land Claims did not validate the entire claim, it did validate an area contiguous to the 8,600-acre tract in issue - hence there was a substantial objective basis for the Indians' belief that they jointly owned the disputed land.

Since the Commission's findings are supported by substantial evidence, and since its decision is free from errors of law, the interlocutory orders and determinations appealed from must be, and hereby are

Affirmed.

APPENDIX H

Motion to Vacate and Affidavits and Documents Filed in the Court of Claims in Support Thereof

IN THE UNITED STATES COURT OF CLAIMS

PUEBLO OF SANTO DOMINGO,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 355
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MOTION TO VACATE OR MODIFY THE MAY 9, 1973 ORDER OF THE INDIAN CLAIMS COMMISSION, INSOFAR AS IT FINDS EXTINGUISHMENT OF PETITIONER's ORIGINAL INDIAN TITLE

Petitioner hereby moves the Court for an order vacating or modifying the Interlocutory Order of the Indian Claims Commission of May 9, 1973, in Pueblo of San Ildefonso v. U.S., 30 ICC 234 (1973) insofar as the Order finds extinguishment of Petitioner's original Indian title to certain lands, and finds the United States liable therefor, and as reason therefore states as follows:

1. As to extinguishment of Petitioner's title, the May 9, 1973 order was based entirely upon a stipulation between the parties, dated October 29, 1969 and no facts whatsoever were in evidence nor do

any exist upon which such a finding could be independently based.

2. The stipulation that conceded the extinguishment of Petitioner's original Indian title to certain lands was entered into by attorneys for Petitioner without the knowledge or consent of the Petitioner, and in contravention of Petitioner's express wishes as stated in its original Petition. The stipulation is and was unauthorized and void.

3. The attorney's contract between Petitioner and Darwin P. Kingsley required that any compromise, settlement or adjustment of the claim be approved by the Commissioner of Indian Affairs. No such approval was ever sought or given. The stipulation was thus entered into a contravention of the attorney's specifically limited authority and is void.

4. Legislation that abolished the Indian Claims Commission as of September 30, 1978 gave the Court of Claims jurisdiction to hear and decide any cases that were at that time pending in the Indian Claims Commission. This legislation required the Court of Claims to apply the rules of the Indian Claims Commission Act, 25 U.S.C. §70(a)-(v), to those cases that were pend-

ing in the Indian Claims Commission on the date that it was abolished. The case herein is one that is defined as "pending" under authority of the statute granting the Court of Claims jurisdiction to hear the Indian Claims Commission case.

5. Because the 1973 decision of the Indian Claims Commission was interlocutory in nature, the Commission had full discretion to, at any time after entry of the decision, reconsider, vacate, amend, or set aside the order. The Court of Claims, being the statutorily-appointed successor to the Commission as to those cases pending at the time the Commission was abolished, and being mandated to apply the rules of the Indian Claims Commission Act, has the full discretion to amend, set aside, or reconsider decisions of the Indian Claims Commission that the Commission would have had had it not been abolished. The Court of Claims thus has the jurisdiction and authority to grant Petitioner the relief it seeks.

6. Under the established principles of "Original Indian Title," Petitioner's aboriginal title exists until Congress, by a clear and plain intent, extinguishes it. Congress has enacted no statute that

extinguishes Santo Domingo's original Indian title. Petitioner would thus succeed on the merits of its claim were it not for the entry of the unauthorized stipulation and the subsequent order.

7. The Indian Claims Commission, pursuant to the Indian Claims Commission Act, 25 U.S.C. §70(a)-(v), had jurisdiction to adjudicate claims for damages against the United States for interference with Petitioner's use and occupancy of its lands and for Petitioner's lands, as pleaded in Petitioner's original Petition, under the "fair and honorable dealings" clause of the ICCA. The Court of Claims, pursuant to 25 U.S.C. §70(v), has, as to those cases that were pending in the Indian Claims Commission at the time of its abolition, the same jurisdiction as did the Indian Claims Commission and thus has the authority to entertain the claims of Petitioner as originally filed in this matter in 1951.

8. The Petitioner has continuously and consistently, since the initiation of this action, maintained that its "Original Indian Title" to its aboriginally-used lands has never been taken by the United States. Petitioner, through its Tribal

Council, specifically directed its attorneys not to seek compensation for a taking of its lands, but rather to seek to regain the use of the lands for the Pueblo. If the interlocutory order of the Indian Claims Commission, based upon the unauthorized stipulation, is given effect, it will seriously impair the ongoing efforts by the Pueblo to quiet title and regain control of its original Indian title lands.

9. There has been no detrimental reliance by the defendant on the interlocutory order of the Indian Claims Commission, and thus the United States will not be prejudiced by any action of this court setting aside or modifying the 1973 decision. The granting of Petitioner's motion will return both parties to the status quo as the time of the entry of the unauthorized stipulation, and relieve the United States of an actual finding of liability.

10. Justice and equity will be accomplished by setting aside or modifying the 1973 order, insofar as the stipulation upon which the order was based was entered into without the knowledge or consent of the Petitioner and against the specific instructions of the Santo Domingo Tribal Council and the attorney's contract. To permit

the unauthorized stipulation to result in a finding that the Petitioner's original Indian title has been extinguished would be unconscionable in the extreme.

WHEREFORE, Petitioner requests that this Court vacate the May 9, 1973 Order of the Indian Claims Commission insofar as it finds that Petitioner's original Indian title to lands has been extinguished and finds dates of taking therefore and such other relief as is just in the premises.

Respectfully submitted,

THOMAS E. LUEBBEN
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Albuquerque, NM 87102
(505) 842-6123

By /s/
Attorney for Petitioner

UNITED STATES COURT OF CLAIMS

PUEBLO OF SANTO DOMINGO, Plaintiff,	)	
v.	)	Docket No. 355
THE UNITED STATES OF AMERICA, Defendant.	)	(Transferred from the Indian Claims Commission)

A F F I D A V I T

Reyes Quintana, under penalty of perjury, states as follows:

My name is Reyes Quintana. I am of sound mind and competent to testify to the matters stated herein. I was born on January 3, 1906, at Santo Domingo Pueblo. At the present time I am serving a one year term as Governor of the Pueblo. I am a full-blooded Santo Domingo Tribal member.

I went to school at the Santa Fe Indian School, through the eighth grade. For six years, during the 1940's I worked at a munitions plant in Utah. Other than those periods, I have lived all of my life at the Pueblo. I speak and understand English, but Keres, the native language of Santo Domingo, is my first language. There

are many words in English I do not understand well.

Starting in about 1944, until I resigned in 1979 for health reasons, I served as a tribal spokesman. The spokesmen act as interpreters for the Tribal Council, and are responsible for explaining to the Council things that go on in the outside world of which the Council needs to be aware. That position required that I attend Council meetings fairly regularly, and I attended at least half of the meetings while I served in that position.

The first I ever knew about this land claim matter was about 1946. John Bird, who was also one of the spokesmen for the tribe, explained to the Council that a law had been passed in Washington that would allow the tribe to file a complaint to ask for money damages for the fact that non-Indians were using Santo Domingo land. We all knew that there was a large area outside of the boundaries of our Spanish grant, which we still believed was ours and which we still used, but which had been fenced off by the non-Indians, so the Council decided to hire a lawyer to file a claim over that land.

I was not present at the Council meetings when the Council hired Mr. Darwin Kingsley, or when they approved the filing of the Petition, but I heard that these things had occurred, and of course the land claim was a matter of great concern to the Council thereafter. Whenever they talked about the case, or the land, however, it was very clear that the Council still believed that Santo Domingo owned all the land it had ever owned. The Council had never sold or given the land away, and the United States never took it from us. The problem as the Council saw it then, and still sees it now, was that non-Indians were using our land without Santo Domingo permission. That was how we understood it, and that has never changed.

I never heard anyone talk about changing the nature of our land claim, in 1969 or afterward. There has never been any decision by the Council, that I know of, to tell the Court that we had lost our land forever. A decision like that would be an important one for the Council to make and would take a long time. As far as I know, the Council has never even considered doing that. If the claims attorneys did it, it was done without our permission or

knowledge.

The claims attorneys rarely came to talk to the Council about the case. Mr. Kingsley came out a few times, but the last time I know of was in 1953 or 1954, when we had three hearings in the case in Santa Fe. I never met any of the other attorneys in the case in Santa Fe. I never met any of the other attorneys in the case, and cannot recall seeing them at the Pueblo. The Council just asumed that they were doing their jobs, carrying on the case the way the Council understood it.

We never had any idea that the claims attorneys had filed a paper in the Court saying Santo Domingo no longer owned the land, until our attorney, Mr. Luebben, began to explain it to us recently. If that happened, the Council never knew about it, and that is not how the Council feels about the land.

There are a great many religious shrines of importance to Santo Domingo located outside of our current Reservation boundaries, that our religious leaders have always used and still use to this day for ceremonial purposes. The areas around these shrines are important sources of

plant and mineral material needed for religious practices, and such material has always been gathered in these areas. Until the non-Indians started erecting fences across our land, about thirty years ago or so, we regularly grazed our livestock throughout our aboriginal Indian title lands. We kept our horses, which we needed for hunting and for threshing wheat, on La Bajada Mesa, to the north, and our sheep and cattle grazed throughout our aboriginal lands. We hunted in the mountains to the west, and in the country to the southeast. All these activities countinued without interruption for hundreds of years, until the fences started going up. We never agreed to allow the fences to be erected, and we have continued to consider these lands as our own. Even though we have been prevented from using them in the recent past for grazing purposes, we have continued to use the land for purposes associated with our native Santo Domingo religion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 21, 1980.

/s/
Reyes Quintana, Affiant

CERTIFICATION OF INTERPRETER

I hereby certify that I am competent in interpreting from English to Keresan and Keresan into English and that the foregoing affidavit has been fully and correctly interpreted and read by me to the affiant in Keresan and that the affiant has stated that it truly and correctly states his meaning.

/s/
FELIX CALABAZA

Spokesman and Interpreter
Pueblo of Santo Domingo

IN THE UNITED STATES COURT OF CLAIMS

PUEBLO OF SANTO DOMINGO, Plaintiff,	)	
v.	)	Docket No. 355
UNITED STATES OF AMERICA, Defendant.	)	

A F F I D A V I T

Felix Calabaza, under penalty of perjury, states:

My name is Felix Calabaza. My address is General Delivery, Santo Domingo Pueblo, New Mexico 87052. I am a full blood Santo Domingo Pueblo Indian. I am a high school graduate and have completed the Indian Court Judges' Training Program at the University of New Mexico School of Law. Although my native Pueblo Indian language, Keresan, is my first language, I also speak English fluently. I have become increasingly familar with Santo Domingo Tribal issues since 1961 when I began serving in a variety of official positions for the Pueblo. In 1968 I was appointed as a spokesman for the Pueblo, and I became a full member of the Pueblo Council in 1970. In 1971 I served

as Lieutenant Governor for the Pueblo, and in 1974 I served as Governor. Although tribal spokesmen are not members of the Tribal Council, they are required to attend all tribal council meetings to serve as spokesman and interpreters. I lived at the Pueblo all my life except for those years when I was away from my people attending school at the St. Katherine's Indian School in Santa Fe, New Mexico, and the Albuquerque High School in Albuquerque, New Mexico, although I returned to the Pueblo on a weekly basis to spend time with my people and to participate in Pueblo social and religious activities. I returned to live permanently at the Pueblo in 1965. I participate actively in the Pueblo's religious and ceremonial life.

In 1965 I learned from Pueblo elders that the Pueblo was concerned about its boundaries. They told me that the present boundaries of the reservation are much smaller than the original ancient boundaries of our Santo Domingo Pueblo Lands. The Pueblo leaders and elders have always been concerned about protecting the Pueblo and getting back the lands which the United States has interfered with. The Santo Domingo people have always recognized and

used their lands for hunting, livestock grazing, gathering medicinal herbs, and religious purposes. The leaders and elders have always been concerned that Santo Domingo should have the right and be able to continue using those lands.

Since 1971, I have become deeply involved in the Pueblo's land problems and I have learned a great deal about the Pueblo's land claims. The Santo Domingo Pueblo Council has always stressed the importance of the Pueblo's lands, the religious sites, the use of which our forefathers have always enjoyed for religious purposes. Our aboriginal Indian title areas surrounding the present boundaries of the Reservation were always very important to the Pueblo. The Tribal Council feels that we have been deprived of some of our practices of our religion in those areas where non-Indians are illegally permitted by the United States government to occupy our aboriginal title lands. It is very dissatisfying to be deprived of the use of our rightfully owned and recognized aboriginal Indian title lands because of the interference by the Bureau of Land Management and the United States Forest Service. The desire of the Pueblo

is to continue to use these aboriginal Indian title lands which are important to the Pueblo for religious sites. We, of course, sometimes experienced interference from non-Indians in our use of the land for religious, grazing, and other purposes. This has caused very dissatisfying feelings at the Pueblo.

I first learned about Santo Domingo's claim in the Indian Claims Commission when I became lieutenant governor of the Pueblo in 1971. I first learned about the land claim at a tribal council meeting where it was discussed in general. I did not understand very much about the land claims at that time. The council talked about the existing Pueblo boundaries and about the possibility of restoration of the lands. The Council discussed its desire to hire a lawyer to work toward land recovery.

During my term as lieutenant governor of the Pueblo in 1971, I was required to attend all Pueblo Council meetings and official activities of the Pueblo government. During that year I did not have any contact with or any communication with any of the claims attorneys. The claims attor-

neys did not come to the Pueblo at any time during 1971 when I served as lieutenant governor.

I was required to attend all the Tribal Council meetings during 1969 because of my official duties as tribal spokesman. To my knowledge our claims attorneys did not visit the Pueblo of Santo Domingo or meet with the Tribal Council at all during 1969.

I first became aware that a stipulation agreeing that our Pueblo land was officially taken by the United States was filed in our land claim case when our tribal attorney, Mr. Thomas Luebben, told me about it in May of this year, 1980. Mr. Luebben first showed me a copy of the stipulation in September of this year. Up to that time, I had no knowledge of this document or that anything like this had been filed in our land case. I know that the Santo Domingo Tribal Council did not discuss or approve the stipulation during 1969. I am sure if the claims attorneys ever came to the Pueblo and presented the matter to the Tribal Council, the Council would not have approved the stipulation before the claims attorneys filed it in 1969. The claims attorneys never gave the

Pueblo an opportunity to vote on the stipulation. The claims attorneys never gave the Pueblo an opportunity to discuss or decide about what alternatives they could take to meet their needs of getting back the lands. I understand now that the original petition filed in our case asked for damages from the United States because the United States trespassed on our lands and did nothing to prevent other people from trespassing on our lands. In fact, the United States has encouraged other people to trespass on our lands and to try to take our lands. I also understand now that the stipulation filed on October 29, 1969, changed the original case so that it looked like we were agreeing to accept compensation from the United States for the taking of our lands and the extinguishment of Indian land title. Because of my work with our tribal attorney, I became knowledgeable of the land problems and extinguishment of title. I understand that there is a big difference between suing the United States for damages for interfering with our lands and suing the United States for compensation for actually extinguishing our ownership of the land. Our Tribal Council has never been given an opportunity to choose between these two things. I

think if all of this had been explained to the Tribal Council clearly enough in 1969 so that they would understand, and if they would have been given an opportunity to choose, they never would have agreed to have our claims attorneys file the stipulation agreeing with the United States that our lands were legally taken. Our Tribal Council, Tribal officials, and the elder leaders in the Pueblo have always wanted to get the land back; this is the most important thing to our people and we strongly oppose what the claims attorneys did in 1969. We have always believed that the land is far more important than the money, and we would rather get the land back than to accept money for the taking of our land title.

The first time I met our claims attorneys was on July 14, 1973, when Mr. Arthur Lazarus and Mr. Bobo Dean came to the Pueblo. They came to attend a Tribal Council meeting at the request of the Pueblo. We asked them to come and explain the status of the Pueblo's claim. At the time, Mr. Lazarus and Mr. Dean explained that the Tribe's only alternatives were to accept monetary compensation for the land. Mr. Lazarus explained that the value of

the lands would be based on the date of taking, and would probably be $3.25 an acre or $3.50 an acre in some areas. The Tribal Council was very surprised that the only alternative was to accept monetary compensation for the lands, but they did not discuss at that time whether they would accept money for the land. The reasons they did not discuss it is that they continued to recognize that the Pueblo still owned the land. At this time I spoke to Mr. Lazarus and Mr. Dean on behalf of my tribe. I told them that the feelings of the Tribal Council was only for the return of the lands and not accept monetary compensation for the lands. I asked Mr. Lazarus to explain to us if there was any alternative to satisfy the need of the Tribal Council for land restoration. Mr. Lazarus told us that as claims attorneys they were not in a position to work toward the restoration of the lands, because they were hired just to work in the Indian Claims Commission for monetary awards. Mr. Lazarus also said that if that was the feeling of the Council, that they wanted lands and not money, that they should relieve him of his responsibilities representing the Tribe

in the Indian Claims Commission and hire different attorneys to go forth in efforts of land recovery. Because of the claims attorneys not properly communicating to the Tribal Council, some of the members of the Tribal Council became doubtful of the possibility of land return. Some of the Tribal Council members did not believe that it was possible to regain the lands because whenever the claims attorneys reported to us they told us that it would be impossible to regain the land. So we had a discussion in that council meeting about the possibility of the Tribe seeking funding for the Tribe so that it would be possible for the Tribe to hire an attorney locally to work on recovering the land. We had a long discussion in that Tribal Council meeting about whether it was possible to get the land back. We could not decide to terminate Mr. Lazarus' contract and to hire other attorneys because a few members of the Tribal Council did not believe it was possible to get the land back because what the claims attorneys had been telling the Council. Also, a few members of the Tribal Council believed that we would not be able to get an attorney as knowledgable of these matters as Mr. Lazarus. We did

not come to any decision about the specifically hiring another attorney at that time due to insufficiency of funds to pay an attorney.

It was not until 1974 when I became governor of Santo Domingo Pueblo that I became deeply involved, and had an opportunity to discuss our land claims with the Tribal Council. Not very much of the status of our land claims was being said by the Tribal Council except for what the claims attorney, Arthur Lazarus, had always said about the offer of compensation for land taken by the government. Due to the uncertainities about our claims, I suggested and recommended to the Tribal Council that it might be best for the Council to take the alternative of seeking funding for the purpose of hiring a local attorney to work toward efforts of recovering Indian title lands. The recommendation was well taken by the Tribal Council and they authorized me as the governor of the Pueblo to seek funds through the Bureau of Indian Affairs. As the governor, I immediately took this course of action, preparing a proposal for $50,000 to satisfy the Tribal Council's wishes in the efforts of the land recovery. With the cooperation of the Bureau of

Indian Affairs, we were successful in obtaining this funding which enabled us to do the land studies.

We had a number of Tribal Council meetings during the first quarter of my administration discussing our land problems. Because of the claims attorneys not clearly explaining the status of our claims, the Tribal Council was placed in a much more difficult position. After the first quarter, the Tribal Council continued to discuss our land problems in compiling proper documentation which might relate to our land claim issues. It was then clear to the Tribal Council the possibility of solving the land problems by hiring an attorney locally with the $50,000 received for the benefit of the tribe. We were able to hire an attorney, Mr. Dick Young, who was our first tribal attorney. Mr. Young, whose address was in Albuquerque, New Mexico, first started working for the Pueblo in the month of August, 1974. . .

The Santo Domingo Tribal Council has taken a strong position to go forth in taking all necessary steps to get the United States to correct its past discrepancies and to recognize the Pueblo's ownership of the aboriginal Indian title lands. The

definitions of the land problems have been more clearly defined by Attorney Tom Luebben to the Tribal Council which generates the interest and the strong feelings for getting the land that the Pueblo recognizes as rightfully owned as it was found by our forefathers, and to retain the creation of the Mother Earth for the purpose of educating the coming generations, for they are also entitled to the inheritance of our forefathers which we are required to pass on generation by generation. The lands to which we recognize as our rightful ownership must be protected by the United States Government as the trustee for the Indian people across the nation so that we can perform and satisfy the practices of our religion.

The United States Government as a trustee for the Indians must prevent and stop the business developments near or within the religious sites which may be of some destruction to the Indian properties. We Indians have respect towards the white man's religion. In return, we ask the same respect from the United States Government and its citizens, white men, to have the same respect towards the well-being of the Indian population. We ask the United States

Government to recognize and honor our sovereignty. In closing, the Tribal Council of the Pueblo of Santo Domingo is hereby clearly pointing out that such stipulation of 1969 was never presented to them by our claims attorneys and was never discussed, determined, nor approved by the Council for the attorneys to file with the Indian Claims Commission. The Council clearly states that the land be returned by the United States Government.

Under penalty of perjury, the above is true.

Executed November 22, 1980.

/s/
Felix Calabaza,
Affiant

IN THE UNITED STATES COURT OF CLAIMS

Docket No. 355

(Transferred from the
Indian Claims Commission)

PUEBLO OF SANTO DOMINGO,
Plaintiff,
v.
THE UNITED STATES OF AMERICA,
Defendant.

A F F I D A V I T

Jimmy Moquino, under penalty of perjury, states as follows:

My name is Jimmy Moquino. I am of sound mind and competent to testify to the matters stated herein. I live on San Felipe Street, Santo Domingo Pueblo, New Mexico. I was born on May 15, 1915, and I am 65 years old. I grew up here at the Pueblo and I have lived here all my life. I became a member of the Santo Domingo Pueblo Council in 1954, and I have served as a councilman ever since. I went to school through seventh grade. I speak and understand the Santo Domingo language (Keres) better than English. It is my

first language. There are lots of things in English that I don't understand.

I first learned that Santo Domingo had land problems in 1946 when I came home from the military service. I didn't hear about the Indian Claims Commission and the Santo Domingo claim until I joined the Tribal Council in 1954.

I know that from 1951 on, the Tribal Council wanted land back. They didn't want to take money for the land. The tribe wanted to hire lawyers to get the land back, but they didn't have any money to pay the lawyers. I came on the Council in 1954, but I never knew what the claim was really for. I went to the Indian Claims Commission hearings in Santa Fe in 1954, but even after that I didn't understand what the claim was for.

There were no meetings between the claims attorneys and the Santo Domingo Tribal Council in 1968 or 1969 that I recall. There was no discussion that I recall in the Tribal Council meetings about a stipulation, agreement or settlement of the claim. I didn't attend all of the Tribal Council meetings during that time, but if there had been any discussion of that type, other councilmen would have told

me about it. I do not believe the Santo Domingo Council ever approved or authorized the claims attorneys to file the agreement (stipulation of October 29, 1969) agreeing that our lands had been taken by the United States. I never heard any discussion of this or saw a Tribal Council resolution authorizing it. I don't believe the Santo Domingo Tribal Council would ever agree voluntarily to the taking (extinguishment) of its land ownership because I know the tribe and the tribal councilmen have always wanted to have the land.

November 3, 1980 was the first time I had ever seen or heard of the stipulation filed on October 29, 1969. Our tribal attorney, Thomas E. Luebben, showed it to me and explained it.

I don't like it because the stipulation was never to my knowledge and has never been discussed by the Tribal Council. I would not approve of taking money for the land.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 11, 1980.

/s/
Jimmy Moquino, Affiant

CERTIFICATION OF INTERPRETER

I hereby certify that I am competent in interpreting from English to Keresan and Keresan into English and that the foregoing affidavit has been fully and correctly interpreted and read by me to the affiant in Keresan and that the affiant has stated that it truly and correctly states his meaning.

/s/
FELIX CALABAZA
Tribal Spokesman and Interpreter
Santo Domingo Pueblo

IN THE UNITED STATES

COURT OF CLAIMS

PUEBLO OF SANTO DOMINGO,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Docket No. 355

AFFIDAVIT

Augustine Aguilar, under penalty of perjury, states as follows:

My name is Augustine Aguilar. I am of sound mind and competent to testify to the matters stated herein. I live on Santo Domingo Street, Santo Domingo Pueblo, New Mexico. I was born on September 15, 1894, and I am 86 years old. I was born here at the Pueblo and I have lived here continuously all my life. I am a full-blood Santo Domingo Pueblo Indian. I went to school at the Santa Fe Indian School (boarding school) through the fourth grade. I didn't learn English

until I was seven years old. The Indian (Keresan) language is my first language and I don't understand English very well. Many words in English are difficult for me. I speak and understand a little bit of Spanish.

I was appointed to be a member of the Santo Domingo Pueblo Council (tribal council) in 1924. Members of the Council serve for life unless they resign. Council meetings are always held in the Indian language.

When I was young, I learned about the ancient boundary lines of Santo Domingo Pueblo from the older people. Santo Domingo had lands all around us on all sides beyond the present Reservation boundaries. I know all the old boundary points all the way around on the west, the south, the east, and the north. We used all those lands for grazing, hunting and religious purposes. For instance, there was a house about ten miles southeast of Budagher's filling station, outside the present Reservation boundaries, which we used to use to live in when we were herding in that area. There were always some people from Santo Domingo

living there, taking turns herding the livestock. Santo Domingos were in that area last around 1938. Our people stopped using that area because a white man named Blackshears came in and forced us out. Between 1938 and 1940 the BIA built a fence all around our present Reservation boundary and fenced us out of our grazing areas outside the Reservation boundary. We still use these areas outside the Reservation boundary which we believe are still our lands for religious purposes, but we have to go about it by sneaking around so nobody will see us. Even though we may be forced out of these areas which are part of our ancient territory, we will still continue to use these sites for our religious practices. There are about eight or nine religious sites that we still use in the south-east part of our ancient territory. These go down toward Tuerto Spring on the aboriginal boundary and up toward San Pedro Mountains which are also on the aboriginal boundary. They also go east up toward Turkey Spring just east of Madrid, New Mexico. The

Santo Domingo tribe still uses these areas. We can't graze livestock there any more, however, because these areas are fenced off.

The Santo Domingo aboriginal lands are very important and very valuable to the Pueblo. We would never give up these lands voluntarily. I want my children and descendants to have the benefit of using all of the lands which I know were ours from before Spanish times.

I first heard of the Indian Claims Commission Act and the Indian Claims Commission in 1948 at a tribal council meeting. Bill Brophy, who was an attorney with the Department of the Interior, was the one who first told us about this land claim. But nothing was clear to us, whether the lands would be returned by the government or whether a money award would be given. The land was never sold to the non-Indians; it was just the Pueblo letting them use it of its own free will. Our lands were never given away to the non-Indians. We knew what lands were rightfully ours. We have never, ever taken a position to give our lands away.

I attended most of the tribal council meetings called in 1969, but I

do not ever recall the tribal council agreeing to accept a monetary award for the Santo Domingo lands. I have never seen a copy of the stipulation filed on October 29, 1969 before November 11, 1980, when our tribal attorney, Thomas E. Luebben showed it to me. I don't believe the Santo Domingo tribal council would have ever approved of the stipulation because it seems to mean that we are willing to accept monetary compensation for our land, which we have always opposed.

Under penalty of perjury, the above is true and correct.

Date November 21, 1980

/s/
Augustine Aguilar
(Affiant)

Certification of Interpreter

I hereby certify that I am compentent in interpreting from English to Keresan and Keresan into English and that the foregoing affidavit has been fully and

correctly interpreted and read by me to the affiant in Keresan and that the affiant has stated that it truly and correctly states his meaning.

/s/
Felix Calabaza
Tribal Spokesman and
Interpreter
Santo Domingo Pueblo

IN THE UNITED STATES COURT OF CLAIMS

Docket No. 355

PUEBLO OF SANTO DOMINGO,
Plaintiff,
v.
THE UNITED STATES OF AMERICA,
Defendant.

A F F I D A V I T

My name is Richard L. Young. My address is 2013 Abbott Street, San Diego, California 92107. I am currently employed as a professor of law at the California Western School of Law in San Diego.

For approximately one year, from the Summer of 1974 until the Summer of 1975, I was employed full time as staff attorney to the Pueblo of Santo Domingo. The Pueblo tribal government has very little income, and it was possible for the Pueblo to employ me only because funds for a salary were available from the federal government under the Tribal Governmental Development Program.

During my year of employment with the Pueblo of Santo Domingo, I maintained my

office at the Pueblo Tribal offices and ordinarily worked at the Pueblo each day. I probably gained a greater intimacy with Santo Domingo culture than almost any other outsider during the last decade. During the period of my employment I was asked to work on a wide variety of matters, including the Pueblo's land claims.

Shortly after I began my employment at the Pueblo, I was told by Pueblo leaders and officials that protection and recovery of the Pueblo's land base was of primary importance. Most of the people I had contact with at the Pueblo in my role as tribal attorney, especially the older tribal council members, indicated that land is of extreme importance to the Pueblo, and that the Pueblo would under no circumstances relinquish or give up any lands which it could possibly retain. In fact, the Pueblo refused for more than a decade to execute a right-of-way agreement for New Mexico's main interstate highway (I-25) between Albuquerque and Santa Fe because the New Mexico State Highway Department refused to compensate the Pueblo with exchange lands for the lands required for the right-of-way (approximately 90 acres). I became aware that the Pueblo's original

Indian title area within the outer limits of its aboriginal territorial boundaries contains many ruins and religious and historical sites which are still visited and actively used by the Pueblo as a part of its still living Pueblo religion.

During my full time employment at Santo Domingo I was asked to review the case of Pueblo of Santo Domingo v. United States, Docket 355 before the Indian Claims Commission. Although I had no expertise in this specialized area of the law at the time I began my employment at Santo Domingo, the basic research which I conducted led me to question whether the United States had in fact legally extinguished any of the Pueblo's original Indian title or Spanish grant title lying outside of the presently recognized Pueblo reservation boundaries. I wrote several letters to Mr. Bobo Dean of the law firm of Fried, Frank, Harris, Shriver, and Kampelman in Washington, DC (who were contracted by Darwin P. Kingsley of New York to prosecute Docket 355), concerning the question of extinguishment of the Pueblo's titles. Mr. Dean went to great lengths in answering correspondence to persuade me that the Pueblo's titles were in fact

extinguished, and that there was no recourse for the Pueblo except to seek compensation for extinguishment of title under the Indian Claims Commission Act in the Indian Claims Commission. In answering correspondence, Mr. Dean indicated that the claims attorneys would be willing only to seek recovery of the Pueblo land through legislation whereby the Congress of the United States would transfer lands supposedly owned by the United States in trust for the benefit of the Pueblo. This did not seem appropriate to me because I was unable to determine when or how the United States had legally extinguished the Pueblo's titles in the first place. Unfortunately, my contract with the Pueblo expired before I was able to finally assure myself that the strategy of seeking compensation for extinguishment of title which was adopted by the claims attorneys was unnecessary and inconsistent with the Pueblo's stated desire to recover its lands.

In my correspondence with the claims attorneys, most particularly Mr. Dean, and in direct conversation as well, I advanced the idea that the Pueblo's land titles outside the present Reservation boundaries were not in fact legally extinguished, and that

since the land and its recovery are so important to the Pueblo, efforts should be made to recover use and control of the land and nothing should be done in the process of litigating Docket 355 which might ultimately prejudice the land recovery efforts. Unfortunately, these ideas met with no acceptance whatsoever from the claims attorneys, who continued during the time I worked for the Pueblo to litigate Docket 355 according to their theory that all land titles outside of the present Reservation were extinguished by the United States in one manner or another. Since my one year contract with the Pueblo was not renewed, I was not in a position to do more than suggest to the Pueblo that something needed to be done to protect the Pueblo's apparently unextinguished titles. It was a difficult situation for the Pueblo because their claims attorneys, who had represented them for more than two decades, were absolutely resistant to consideration of strategies which would protect the Pueblo's titles. I was not, however, in a position to take over the case, nor did I know of any other attorneys who were in a position to take over the case at that time. It was not appropriate for me to suggest to the

Pueblo that their claims attorney contract be terminated, and there were no attorneys available to take over had they terminated the claims attorney contract. The problem was the intransigence of the claims attorneys who refused to seriously consider any alternatives to pressing forward for monetary compensation in the Indian Claims Commission for extinguishment of title.

During my work with the Pueblo I discovered that the mineralized areas near Cerrillos, New Mexico from which the Pueblo had mined turquoise for nearly one thousand years had been left out of the stipulated Santo Domingo aboriginal Indian title area. Pueblo members told me on a number of occasions that these areas had belonged to Santo Domingo. I contacted the claims attorneys to inquire about why these areas had been left out. Mr. Dean agreed that these areas should not have been left out, because the 1953 and 1954 testimony of Pueblo members before the Indian Claims Commission had clearly mentioned the turquoise mines as belonging to Santo Domingo. Mr. Dean apparently contacted the Justice Department to see if the United States would agree to include the mines in the stipulated area. The United States would

not, which ultimately led to a trial on the issue of Santo Domingo ownership of what came to be called the "Eastern Boundary" area. Informal research into mineral production records for the area indicated to me that a claim for the value of minerals removed from that area might amount to several million dollars.

During my year of employment I attended several council meetings at Santo Domingo. I found the Santo Domingo Council to be composed largely of older men who have little formal education and who do not speak or understand English well. In fact, many of the councilmen do not speak English at all. I also became aware that the cultural tradition at Santo Domingo is for decisions to be reached only by consensus after very lengthy discussion allowing each and every member of the Council the opportunity to speak his mind fully on the subject. Any complex or important decision, especially those relating to matter of law and legal procedures which are very poorly understood by the Pueblo, is likely to take many months to make. It is simply unrealistic to expect the Pueblo to make any decision with respect to its litigation very quickly.

The general lack of comprehension of these complex matters which involve the non-Indian legal system and the non-Indian alien culture (alien from the Pueblo perspective) makes it difficult for the Council to make decisions. There is great fear among councilmembers of making any mistake for which they might be blamed by their posterity, so the Council is very slow to make any decisions affecting its land claims and litigation.

Under penalty of perjury, the above is true and correct.

November 18, 1980 /s/
Richard L. Young
(Affiant)

IN THE UNITED STATES COURT OF CLAIMS

PUEBLO OF SANTO DOMINGO, Plaintiff,	)	
v.	)	Docket No. 355
UNITED STATES OF AMERICA, Defendant.	)	(transferred from the Indian Claims Commission)

A F F I D A V I T

Thomas E. Luebben under penalty of perjury states as follows:

My name is Thomas E. Luebben. I reside in Tijeras, New Mexico 87059.

I first began work with the Pueblo of Santo Domingo as Tribal Attorney in January of 1977. At that time I had virtually no knowledge or background in the area of Indian land claims or proceedings before the Indian Claims Commission and the United States Court of Claims. Mr. Richard L. Young, who represented the Pueblo as Tribal Attorney for one year in 1974 and 1975, left me with a considerable file collection on various Santo Domingo matters. Mr. Young had virtually no background in Indian land claims, and was just beginning to get oriented in the subject

when he accepted employment as a law professor in California in 1975, and was no longer available to work as Tribal Attorney.

The Pueblo of Santo Domingo has always been a relatively poor pueblo. The tribal government has little income, other than earmarked federal programs and occasional payments for rights-of-way. Mr. Young was employed by the Pueblo as part of a federal program to develop tribal government. This program was called the Tribal Governmental Development Program. At the time I was retained by the Pueblo to represent it, there were no funds available to pay the expenses of my work or my attorneys' fees. I immediately initiated a fund-raising program and my compensation has been paid out of grants made to the Pueblo by private foundations and the federal government. Lack of funds to pay for attorney services has continuously hampered Santo Domingo's effort to assert its rights and protect its land base since the United States acceded to the Southwest under the Treaty of Guadalupe-Hidalgo in 1848.

The early months of my work with

the Pueblo of Santo Domingo were taken up with tribal matters which did not impinge directly on the Santo Domingo land claims in the case of Pueblo of Santo Domingo v. United States, Docket 355. Funds did not really become available for me to review the case in earnest until June 5, 1978, when the Bureau of Indian Affairs awarded a $14,000 contract to the Pueblo for land studies. During the following year I studied and became fairly familiar with the case and with the nature of Indian land claims under the Indian Claims Commission Act. After a considerable period of research, it appeared to me that the Pueblo's original Indian title within its aboriginal territorial boundaries has, in fact, never been extinguished. . . .

It was not until the Summer of 1979 that I felt that I understood the area of Indian land claims under the Indian Claims Commission Act sufficiently well to advise the Pueblo of Santo Domingo as to appropriate courses of action. During the previous year the Pueblo had informed me on a number of occasions that it had always been its position that its land titles were not extinguished by the United States, and that the Pueblo still owned the land.

Various members of the Santo Domingo Tribal Council related to me their experience in grazing sheep, cattle, and horses in the area of Santo Domingo's original Indian title, and their experiences mining turquoise in the Pueblo's old turquoise mining area near Cerrillos, New Mexico. I was asked to advise the Pueblo about the possibilities of recovering the lands that it had lost during the American Period since 1848.

When I reached the conclusion that the Pueblo's original Indian title had never been extinguished, and that the Pueblo's title to the 20,000 acre area which we know as the Santo Domingo Pueblo Grant Overlap Area, had also never been legally extinguished, I contacted the claims attorneys, Mr. Arthur Lazarus and Bobo Dean of the firm of Fried, Frank, Harris, Shriver and Kampelman, and discussed the matter with them. That firm was under contract to Darwin Kingsley of New York to prosecute Docket 355. Mr. Arthur Lazarus contended that the Pueblo's original Indian title has been legally extinguished as found by the Indian Claims Commission in its decision of May 9,

1973, and that the only way to recover those lands was to obtain legislation from the Congress of the United States "returning" the lands to the Pueblo. . . . I pointed out to Mr. Lazarus and Mr. Dean that it appeared to me that under the law as established by the United States Supreme Court that the Pueblo titles had not been extinguished. Mr. Lazarus and Mr. Dean vehemently disagreed, and indicated that they would not participate or represent the Pueblo in any effort to recover lands other than by legislation. It appeared to me, however, to be a strategic error to concede the extinguishment of the titles and rely on the beneficent good nature of Congress to return the lands. I also felt strongly that extinguishment could not have legally occurred under the law as it currently exists. I discussed this matter with Mr. Lazarus and/or Mr. Dean on a number of occasions, both in Washington and at the Pueblo, and was always told that they were certain that the Pueblo's original Indian title was extinguished, and that they would not participate in any effort to recover land other than through legislation. During this period of time the claims attorneys continued to litigate

Docket 355 on the basis of the sweeping assumption that all Santo Domingo Pueblo titles, including original Indian titles and "recognized" title based on Spanish grants, lying outside of the presently recognized boundaries of the Santo Domingo Pueblo Reservation, had been legally extinguished by the United States. . . .

The Pueblo of Santo Domingo is probably the most conservative and traditional Indian tribe on the North American continent.*/ It maintains a functioning traditional tribal government. The Pueblo has never incorporated under the Indian Reorganization Act of 1934, and has no written constitution or by-laws, or written laws or ordinances. The Tribal Council is large, consisting of approximately 60 members. Members of the Council are appointed for life by Pueblo religious authorities whose names, positions and functions are unknown to me or, so far as I am aware, to any other persons

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*/ See Lange, Santo Domingo Pueblo, Handbook of North American Indians, Vol. 9, p. 381.

who are not members of the Pueblo. The governor, lieutenant governor, and the governor's staff serve for one year terms which begin on January 1 of each year. These officials are appointed annually by processes unknown to me or other outsiders.

Due to the demands of the Pueblo's extremely active ceremonial and religious calendar, and the necessity for tribal council members to earn a living, tribal council meetings are held relatively rarely. During certain fairly lengthy seasons of the year, council meetings are usually not held at all. This includes a period of approximately six weeks prior to the end of the year, and approximately six weeks after the beginning of the year. This is a governmental interregnum which is ordinarily occupied by religious and ceremonial activities, and the organization of the new government after the first of the year. Council meetings are very rarely held during June and July, because of the lengthy preparations required for the Pueblo's Feast Day and Corn Dance on August 4. In addition, there is little tribal governmental activity around the time of Easter and Thanksgiving.

All tribal council meetings are held in the Keresan Indian language of the Pueblo of Santo Domingo. When it is necessary to transact business with outsiders, such as myself, all discussion and all documents being considered must be laboriously translated into the Keresan language for the benefit of councilmen who do not understand English. Virtually all of the Santo Domingo Pueblo councilmen understand English imperfectly and some do not understand much at all. I estimate that the average level of education on the Council is about fifth grade. Many concepts essential to an understanding of the various legal matters and the legal processes in which the Pueblo is currently engaged require very extensive and repeated explanation to the Council. This often requires many hours of discussion. . . .

The Pueblo of Santo Domingo adheres rigidly to the common practice of North American Indian tribes of requiring complete consensus among decisionmakers before any action is taken. In addition, anyone who wishes to speak to a particular issue is by tradition given all the time he desires to address the question.

Whenever many councilmen have something to say to a particular issue, it can take many hours to allow everyone to have his say and to reach a consensus. This process is particularly time consuming when the issue to be decided is a complex one of law or legal strategy which the councilmen have great difficulty understanding in the first place. The Council has a strong tendency to avoid difficult decisions on matters it does not understand for as long as possible. It is in fact, quite rational to avoid making decisions on matters which one does not understand.

As a result of the vast gulf which exists in terms of culture, language, and understanding of the world at large between the Santo Domingo Pueblo Council and any attorney who did not grow up as a member of the Pueblo, the Council must often make its decisions on the basis of an implicit trust of the attorney or attorneys because it has no real way to double check the attorney's advice or to evaluate that advice by means of independent judgment. There is no effective way for the Council to disagree with its

attorneys ordinarily. Consequently, the Pueblo Council had no way to evaluate the strategy adopted by its claims attorneys in the period of 1955 [to] 1974, when Mr. Young began to work with the Pueblo as Tribal Attorney. Because of the remoteness of the Pueblo of Santo Domingo from New York and Washington, DC, where the Pueblo's claims attorneys were located, little effective communication really took place between the Pueblo and the claims attorneys. This situation has greatly improved since 1974, however, when Tribal Governmental Program grants from the federal government became available, and Mr. Richard Young was hired as the Pueblo's full-time General Counsel. Because Mr. Young was at the Pueblo every day working with tribal leaders, several tribal leaders began to become knowledgeable about the complexities of the Pueblo's land problems. In 1978 the Pueblo was able to hire three members of the Pueblo as full-time staff to work on Pueblo administration and land problems. I have worked extensively with these persons to inform them of the legal process and the detailed complexities of their land problems, including the

nature and effect of the Docket 355 proceeding and alternative land recovery strategies.

Throughout my approximately three years working with the Pueblo of Santo Domingo, it has always been emphasized to me by Pueblo Councilmen and Pueblo officers that the land is all-important. For the Pueblo of Santo Domingo, its original Indian title lands have a significance far greater than the significance which land ordinarily holds for Europeans. The aboriginal territorial boundary represents the boundary of the Santo Domingo Pueblo cosmos. Within that boundary is contained an entire cultural experience which is described in elaborate oral histories and an extensive mythology. The land is not a fungible commodity to be bought and sold as it is in European culture. Pueblo members have always said to me that the land is not for sale at any price under any circumstances. Important Pueblo ruins, historical sites, religious shrines, and sources of ceremonial and sustaining resources occur throughout the area within the aboriginal territorial boundary. At one point I realized that many councilmen are given to not worrying about the

status of the Pueblo's control or title to the area within the aboriginal territorial boundaries because they believe that the land is theirs to use as a gift from the Great Spirit, and that whatever the white man may say about ownership and use of the land, the land remains inplicitly and obviously theirs. This is, of course, an extremely troublesome attitude because the white man does not respect such ethereal theories of title. I have had to remind the Pueblo repeatedly that it must act affirmatively to protect is land titles and resources within the framework of American law.

The above discussion is given by way of explaining that within the very real functional limitations placed upon it by its own culture and by the situation in which it finds itself with respect to the currently dominant American government and culture, it has done the best that it can to protect its lands and to take all necessary actions to protect those lands. It is a tribal government, however, which is extremely ill-adapted to making the decisions which are required to survive in the modern technological world. Its methods and pace of decisionmaking are quite appropriate

to the nontechnological and slow-paced world of Pre-Columbian America. It simply cannot, however, deal with issues or make decisions at the pace which is appropriate to ordinary, non-Indian litigation.

The Pueblo officials and the Santo Domingo Pueblo Council have emphasized from the outset of my employment as tribal attorney that their primary objective is to recover as much land within their original Indian title area as possible. With that in mind, I have spent a major proportion of my working time during the last three years which has been allocated to the Pueblo of Santo Domingo performing legal research as to the applicable law and the possibility of recovering lands, and setting into motion the necessary work which will ultimately result in attempts to quiet title to these lands. I have satisfied myself in my legal reserach [sic] that in fact the rule applicable to the question of extinguishment of original Indian titles is the rule of United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941), that the Congress of the United States must act with express intention to extinguish original Indian title. In the absence of such express extinguishment by

Congress, extinguishment has not taken place. Other decisions of the United States Supreme Court overwhelmingly support this rule. The work at Santo Domingo has therefore become a problem of preparing to prove the unextinguished original Indian titles of the Pueblo of Santo Domingo in administrative and quiet title proceedings designed to recover land. . . .

/s/
Thomas E. Luebben,
Affiant

UNITED STATES COURT OF CLAIMS

PUEBLO OF SANTO DOMINGO Plaintiff, v. UNITED STATES OF AMERICA Defendant.	)	Docket No. 355

District of Columbia) ss:

AFFIDAVIT OF WILLIAM E. HALLETT

1. My name is William E. Hallett. I am the Commissioner of Indian Affairs. In this capacity I am responsible for the daily operations of the Bureau of Indian Affairs nationwide.

2. I make this affidavit with respect to plaintiff's contention that the Commissioner of Indian Affairs did not approve the Stipulation As To Standing To Sue, Liability And Area filed October 29, 1969, before the Indian Claims Commission in Docket No. 355.

3. Darwin P. Kingsley, Jr., Attorney of Record for Plaintiff from 1951 to 1979, filed the claims in Docket No. 355 under the authority granted to him in

Contract Symbol I-1-ind. 42607 dated August 1, 1951, and approved by the Acting Commissioner of Indian Affairs on August 9, 1951.

4. Contract symbol I-1-ind. 42607 provides that:

"The Attorney in performance of the duties required of them under this contract shall be subject to the supervision and direction of the Commissioner of Indian Affairs, and shall not make any compromise, settlement, or other adjustment of the matters in controversy unless with the approval of the Commissioner of Indian Affairs; the Attorneys shall also pursue the litigation in question to and through the Court of final resort unless authorized by the Commissioner of Indian Affairs to terminate the proceedings at an intermediate stage therof."

5. I caused a search of Bureau records to determine whether the Commissioner of Indian Affairs granted approval of the aforementioned stipulation and found that no such approval was requested or granted.

/s/
William E. Hallett

Commissioner of
Indian Affairs

Subscribed and sworn to before me this
19th day of November, 1980.

/s/_____
Notary Public

My Commission Expires: December 14, 1980

61h

Santo Domingo Tribe
Santo Domingo Pueblo
New Mexico 87052

July 2, 1975

S. Bobo Dean, Esq.
Fried, Frank, Harris, Shriver
& Kampelman
Suite 1000, The Watergate 600
600 New Hampshire Ave. NW
Washington, D.C. 20037

Dear Mr. Dean:

Enclosed herewith are copies of the 1960 and 1962 patents from the U.S. to the State of New Mexico, with reference to the school sections located within the Tribe's aboriginal title area. I have designated the pertinent sections in each patent, as you will note.

You were certainly right in pointing out that a claim for a "taking" which had not yet occurred before the time limit specified in the Indian Claims Commission Act (i.e., 1951) is expressly excluded from the Commission's jurisdiction by Section 2 of the Act. However, it would seem that the Tribe could validly have made a claim which did accrue before 1951--a claim for rents and profits, etc., derived from the wrongful use of the Tribe's land with the acquiescence of the federal trustee for a long period of years. If this is true, then it would appear that a final decision by the Commission which did not deal with such a claim might well result in any subsequent claim

relating to the school lands, under Sections 12 and 22 of the Act, being forever barred.

Also I am troubled by the suggestion that the Tribe could safely allow the Commission to render a final decision awarding money damages for the taking of all 77,000 acres, with the Tribe retaining its option to refuse the money award and instead attempt through legislation or litigation to recover the land. Section 22(a) of the Act says that when the Commission's final report "has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims." Section 22(b) says that "a final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy." Might not the U.S. argue that, under the general policy against splitting claims, the Tribe was obligated to present all claims it had to the Commission, and that the Commission's decision must be viewed as finally determining against the claimant all accrued claims which the claimant might have presented to the Commission? Section 12 of the Act certainly supports such an argument, in providing that "no claim existing before such date (1951) but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress." Perhaps I am being unduly cautious, but I am really afraid that if the Tribe does not make whatever legal claims it may have to recover the lands in question <u>before</u> the Commission

files its final report with Congress, there is a very real danger that the Tribe may never be able to do so.

In the same vein, it was vexing for me and the Council to learn that since the filing of the Tribe's petition in 1951, the Tribe's claims attorneys have never argued for the position that the Tribe's aboriginal title was never extinguished--despite the express disclaimer on page 3 of the petition as to the Tribe's intent in filing a claim for money damages. To the best of my knowledge, the claims attorneys in the Zia case similarly did not argue for unextinguished Indian title as to any of the lands involved in that case. To the contrary, if counsel on either side raised the issue, it apparently must have been the Government's attorneys who made the argument (in order to avoid having to pay any compensation to the Tribe).

After considerable review of the relevant statutes and Supreme Court cases, I have concluded that there is a very strong argument that Congress never authorized any of the administrative actions which the Commission viewed as "takings" of the Tribe's Indian title lands by the United States. In view of the general rule that Indian title can only be extinguished by Congress (and then almost invariably with the voluntary agreement of the Tribe)--and in light of the rule that general federal land legislation dealing expressly or impliedly only with public lands of the United States, does not extend to Indian tribal lands--it seems to me that Congress clearly did not authorize President Roosevelt to extinguish Indian title to the Forest Service lands in 1905, nor did Congress authorize

the Secretary to extinguish Indian title to the BLM lands in 1941. At this point I even have doubts that any statutory authority can be found to support the extinguishment of Indian title as to the lands patented to private individuals under the general homestead and pre-emption laws--especially when one looks at special protective legislation such as Section 17 of the Pueblo Lands Act of 1924.

I realize that it is very late in the game for someone to raise these questions, but as you know the Tribal Council has always given highest priority to the recovery of land, rather than money. If and when Mr. Shifter comes out here, I suggest that we reserve some time to explore these questions in depth. It is just too cumbersome to try to exchange ideas through the mail.

Thanks for your continued cooperation and kind assistance.

Very truly yours,

/s/

Dick Young
General Counsel

encls.

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
Suite 1000
600 New Hampshire Avenue, NW
Washington, DC 20037

November 9, 1978

The Honorable Valentino Garcia
Governor, Pueblo of Santo Domingo
General Delivery
Santo Domingo Pueblo, NM 87052

Re: Pueblo of Santo Domingo v. U.S., Docket No. 355

Dear Governor Garcia:

In August of this year, shortly before it went out of existence, the Indian Claims Commission ruled that the turquoise mine area, consisting of approximately 4,300 acres, was at some time prior to 1879 a part of the country to which the Pueblo of Santo Domingo held aboriginal title. The Commission did not rule on whether this 4,300-acre tract had been "taken" by the United States or, if so, on what date.

When the Pueblo's delegation was in Washington during May of 1977, for the trial on aboriginal title to the turquoise mine area, I made clear my position that this firm (with Frank Karelsen) would continue to work on the Pueblo's case only so long as it remained within the context of the Indian Claims Commission Act and

only if the Pueblo made up its mind about the direction in which it wished to proceed. I reiterated our position during a meeting with Tom Luebben, your general counsel, earlier this year, the substance of which is summarized in the attached memorandum dated February 15, 1978, and again restated my position when I visited the Pueblo last April. After several follow-on requests that the Pueblo make a decision, we were advised by Mr. Luebben on May 8, 1978, that you would "research and decide what parts of Docket 355 to continue in the Indian Claims Commission before the next phase of the proceedings." (Emphasis added.)

Since the Government does not seem disposed to appeal the Commission's August decision, and the time for so doing has nearly expired, we have reached the stage of prosecuting the case as far as I had agreed to go, absent further advice from you. As yet, however, we have received no word from the Pueblo concerning its intentions. Since the time for decision has long since arrived, and since for the reasons discussed below, we cannot move forward with Docket No. 355, even if we wanted to, without some expression of the Pueblo's views with respect to the case, I am instructing all the attorneys in this office to cease further work on it. We will continue to cooperate with Mr. Luebben to the extent of giving him access to data in our files, but we shall no longer spend time on substantive matters unless and until the Pueblo comes to grips with the questions we have posed, which are critical to a definition of how the claim is to go forward, if at all, and which also are critical to whether our firm has any further role to play in the

litigation.

Before a trial on valuation can be held, for example, the Court of Claims (the successor tribunal to the Claims Commission) must determine (or the parties must stipulate) whether the area to be valued includes the turquoise mine area. We have been requested to draft a contract for the Pueblo with a mineral appraiser to prepare for the valuation trial. However, we find ourselves unable to give the mineral appraiser instructions until we ourselves are further informed by the Pueblo as to how it wishes to proceed.

The basic question which the Pueblo must answer at this point is whether it is prepared to contend before the Court of Claims that the 4,300-acre turquoise mine area, in addition to the other lands previously ruled on by the Commission, was at some date prior to the end of 1941 taken from the Pueblo by the United States without compensation. If the Pueblo wishes to argue that the 4,300 acres have been taken, we would issue instructions to the mineral appraiser requiring him to render an opinion as to the value of all subsurface resources at the time of their taking and an opinion as to "trespass damages" (flowing from the failure of the U.S. to protect the Pueblo's aboriginal title land from white exploitation) accruing prior to the taking. If the Pueblo, on the other hand, wishes to contend that the 4,300 acres still belong to it (and, accordingly, have never been taken by the U.S.) with the exception of lands actually patented or subject to homestead entry, a very different set of instructions, designed to compute "trespass damages" over a longer period, must be

issued to the mineral appraiser.

The same question posed by the mineral valuation is, of course, also relevant to the surface resources of all lands found by the Commission to have belonged to the Pueblo at one time, but to which your title was extinguished by the United States. In short, if you now take the position that the Pueblo's title has not been lost, there does not seem to be very much left for us to try in the case. Moreover, as we have repeatedly informed you, we will not participate in any litigation in which the Pueblo seeks to have itself declared the current owner of lands within its aboriginal title area which were subject to the Taylor Grazing Act or other exercise of dominion by the Government. The Indian Claims Commission Act provides money damages for the taking of Indian land and for the failure to protect Indian land from trespass. The Act provides no authority for any court to declare a tribe or Pueblo to be the current owner of lands or to return lands to their possession.

Finally, as we also have advised you on numerous occasions, we believe the best course the Pueblo could follow would be to obtain a judgment against the United States for the taking of its lands and then to seek legislation in the Congress for their return in trust. As we assume Mr. Luebben has reported to you, this is exactly the procedure adopted by the Pueblos of Zia and Santa Ana. In short, a number of years ago these Pueblos obtained judgments in the Commission for the loss of aboriginal title lands. This year Congress restored 4,850 acres to Zia, all of which had been the subject of its land claim before the Commission, and about

16,000 acres to Santa Ana, about two-thirds of which was covered by an award of the Commission. Presumably you could make an equally good argument for restoration of land on behalf of the Pueblo of Santo Domingo.

As noted above, we will await the Pueblo's decision on the foregoing issues before taking any further action on the Pueblo's case. I look forward to hearing from you.

With kind regards,

Sincerely yours,

/s/

Arthur Lazarus, Jr.

cc: Thomas Luebben, Esquire
Mr. Ernest Lovato
Frank E. Karelsen, III, Esquire

Attachment

Opposition

Office - Supreme Court, U.S.
FILED
MAY 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1622

In the Supreme Court of the United States

OCTOBER TERM, 1981

PUEBLO OF SANTO DOMINGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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CAROL E. DINKINS
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QUESTION PRESENTED

Whether the Court of Claims abused its discretion by holding that petitioner may not withdraw from a stipulation that its counsel entered into in 1969 and that formed the basis for determinations that were made by the Indian Claims Commission in 1973 and affirmed by the Court of Claims in 1975.

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In the Supreme Court of the United States

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PUEBLO OF SANTO DOMINGO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-21a) is reported at 647 F.2d 1087.

JURISDICTION

The judgment of the Court of Claims was entered on April 22, 1981, and a petition for rehearing was denied on October 2, 1981. The petition was filed, after an extension, on March 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

RULE INVOLVED

Rule 152(b) of the Rules of the Court of Claims provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.; Response; Reply. On motion conforming to Rule 51 and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. * * *

STATEMENT

In 1951, petitioner, an Indian tribe, filed a petition (Pet. App. 1c-34c) with the Indian Claims Commission (ICC) pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. 70 *et seq.* Among other

things, the tribe alleged various trespasses by the United States upon alleged tribal lands. In 1969, the parties entered into a stipulation that the United States was liable for extinguishing petitioner's aboriginal title to the described tracts of land. In 1970, the claim proceeded to trial before the ICC on the issue of the dates of the extinguishment of petitioner's aboriginal title, and in 1973 the ICC handed down its decision (Pet. App. 1f-77f).

The ICC rejected the government's alternative contentions (1) that the petitioner's aboriginal title had been extinguished by an 1858 Act of Congress or (2) that by 1905 the entries and claims of rights by non-Indians within petitioner's aboriginal areas had become so numerous that petitioner's title was extinguished. Rather, the ICC found that the United States had disposed of the property at issue by conveyances made to various grantees under the public land laws, by inclusion in the Jemez Forest Reserve in 1905, and by inclusion in New Mexico Grazing District No. 1 created under the Taylor Grazing Act in 1941 (Pet. App. 4f-6f). The ICC determined the dates of the takings accordingly (*id.* at 15f, 76f) and ordered that the case proceed to a determination of fair market value (*id.* at 76f).

The United States took an interlocutory appeal to the Court of Claims, claiming that the ICC had erred in fixing the dates of the takings. However, the Court of Claims sustained the ICC's determinations (Pet. App. 1g-41g). 513 F.2d 1383 (1975).

On November 23, 1980, petitioner filed a motion under Court of Claims Rule 152(b) to vacate or modify the ICC order of 1973 insofar as it found extinguishment of petitioner's aboriginal title (Pet.

App. 1h). The motion alleged that petitioner's attorney had not been authorized to enter into the stipulation and that it therefore should not be binding. The Court of Claims denied the motion, holding that it had not been made within a " 'reasonable time,' " as the Rule requires (*id.* at 1a-7a). This court stated: "Petitioner's attempt herein to withdraw from a stipulation entered nearly twelve years ago falls egregiously outside the permissible range of delay" (*id.* at 5a).[1]

ARGUMENT

The decision of the Court of Claims is correct and does not conflict with any decision of this Court or of any of the courts of appeals. Moreover, it entails a discretionary determination lacking in general importance. Accordingly, further review is not warranted.

1. Rule 152(b) of the Rules of the Court of Claims provides that the court may relieve a party from a final judgment, order, or proceeding on various grounds, but the Rule also provides that a motion seeking such relief "shall be made within a reasonable time." The Court of Claims has interpreted the rule to require that the moving party act with "diligence." *Andrade* v. *United States*, 485 F.2d 660 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974).

In this case, the stipulation in question was entered into in 1969, and petitioner made no attempt to withdraw from that stipulation until 1980. In the intervening eleven years, the claim proceeded to trial be-

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[1] Judge Nichols dissented. He would have remanded the case to permit petitioner to establish, by clear and convincing evidence, that its attorney had wrongfully entered into the 1969 stipulation (Pet. App. 13a).

fore the ICC. Only the government appealed from the ICC's order. Five years elapsed between the Court of Claims' affirmance of the ICC order and petitioner's motion to vacate. Based upon these facts, the Court concluded that "[p]etitioner's attempt herein to withdraw from a stipulation entered nearly twelve years ago falls egregiously outside the permissible range of delay" (Pet. App. 5a). The court's conclusion that petitioner simply "tarried too long" (*id.* at 6a) was wholly reasonable, and further review of a determination of that nature is particularly unwarranted.

2. Petitioner's claim (see Pet. 12-16, 22-23, 48-52) that its previous attorneys lacked authority to enter into the stipulation is supported by little, if any, evidence other than the recollections of members of petitioner itself (see Pet. App. 1h-35h). Petitioner relies (Pet. 23, 51-52) upon a provision in its contract with its previous counsel stating that counsel " 'shall not make any compromise, settlement, or other adjustment of the matters in controversy unless with the approval of the Commissioner of Indian Affairs * * *' ", and petitioner submitted an affidavit to the effect that no such approval was sought by its attorney in 1969 (Pet. App. 58h-59h). However, petitioner's interpretation of the contract is contrary to that adopted in *Navajo Tribe of Indians* v. *United States*, 601 F.2d 536 (Ct. Cl. 1979), cert. denied, 444 U.S. 1072 (1980), which involved an identical contractual provision. In that case, Indians relied upon the contract provision in claiming that their former attorney lacked authority to withdraw certain claims from the court's consideration. Rejecting their interpretation of the contract, the court held that approval by the tribe and the Commission was required only when the compromise, settlement, or adjustment involved "the termination of claims in return for some

consideration given in exchange therefor." 601 F.2d at 539. The court held that the contract "did not limit the attorney's authority to withdraw certain claims" and reasoned that any such constraint would hamper counsel's ability to conduct Indian litigation effectively. *Ibid.* Thus, in this case, the failure of petitioner's former attorney to seek the Commissioner's approval prior to entering into the stipulation did not render the stipulation unauthorized.

Petitioner also relies heavily (see Pet. 12-14, 22, 49-50) upon the fact that the petition filed in 1951 alleged only trespasses upon petitioner's lands rather than takings. However, it is not uncommon for a litigant to modify its original claim after years of litigation, especially when the modification is made in connection with a concession of liability by the adverse party.

In sum, petitioner's motion was filed far too late and there is apparently little credible evidence supporting its claim. Furthermore, as this Court has observed (*Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962)): "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
WENDY B. JACOBS
Attorneys

MAY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 373354 885

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1622

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

PUEBLO OF SANTO DOMINGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONER SANTO DOMINGO

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REPLY BRIEF OF PETITIONER
PUEBLO OF SANTO DOMINGO

ARGUMENT

I. INTRODUCTION

The brief for the United States in opposition to the Pueblo of Santo Domingo's petition for certiorari evades the compelling issues raised by petitioner and instead mischaracterizes the proceedings and then denigrates the Pueblo's position. This tactic merely apes the cavalier treatment by the Court of Claims below, the propriety of which is precisely what petitioner seeks review of.

In its petition the Pueblo of Santo Domingo points out that the unauthorized stipulation from which it seeks relief does not just jeopardize possible claims against the United States for longstanding wrongs, but uncon-

ditionally concedes the loss of protected tribal lands, in direct conflict with venerable principles and policies of this country protecting Indian property. The stipulation runs directly counter to both the detailed bill of complaint filed in this case, and the ancient, unswerving position of the Pueblo of Santo Domingo that it owns the lands in question.

The Court of Claims, without even allowing oral argument or an evidentiary hearing, insists that the Pueblo is bound by the stipulation. The court's denial of any process at all flagrantly misapplied principles of agency and utterly ignored the grounds on which petitioner seeks relief from what in its traditional view portends a cataclysmic loss.

II. THE GOVERNMENT EITHER IGNORED OR DISTORTED EACH OF THE ISSUES RAISED IN THE PETITION FOR CERTIORARI

The principal issue presented by

Santo Domingo's petition is the utter irreconcilability of the dealings ratified by the Court of Claims below with the protections accorded Indian lands by Congress and by this Court. The Court of Claims summarily confirmed the cession of 77,000 acres of Santo Domingo's tribal land, dismissing as irrelevant a record clearly demonstrating that the Pueblo was neither aware of nor consented to the cession, and that neither Congress nor any appropriate federal official authorized or approved it. Thus, the decision in the Court of Claims was in direct conflict with an imposing line of cases in this Court protecting Indian tribes from loss of their land, unless such loss is mandated by express act of Congress. See Petition 32-39.

The government, like the Court of Claims, disregards this issue, and the related issues of fact and law raised by

the petition. The Pueblo of Santo Domingo argues that the challenged stipulation was never authorized by the governing authorities of the Pueblo, that the Pueblo was not notified of the stipulation until several years after the fact, that required procedural protections and fiduciary duties were neglected by its attorneys and the Indian Claims Commission (ICC), and that a massive miscarriage of justice would result from forced adherence to the stipulation. These arguments raise important questions about the Indian claims process itself, private claims attorneys operating on a contingency fee basis, the highly regulated relation of attorneys to their tribal clients, the duty owed to tribal parties by quasi-judicial entities, and the scope of federal protection of Indian lands.

In its statement of the case, the government gives the distorted impression

that the Indian Claims Commission held a full trial and made complete findings on the issue of how Santo Domingo's title was extinguished. In truth, following the stipulation, the ICC called for valuation dates, both sides submitted proposed dates of taking together with briefs, and a short hearing was held for the submission of exhibits and argument. The Commission rejected the government's dates, accepted the dates of claims counsel, and never addressed the issue of whether the given acts of the Executive could actually extinguish title. In effect, the Commission allowed the attorneys for the respective parties to invent new law for their own convenience. The Court of Claims affirmed the Commission. The unauthorized stipulation was the sole basis upon which the Commission proceeded to find dates of extinguishment.

The government also states that

petitioner moved under Court of Claims Rule 152(b) to vacate or modify the ICC order incorporating the stipulation. This is untrue. Petitioner moved for relief from the interlocutory order under the Commission's own rules governing such relief. Petitioner specifically argued to the Court of Claims and in its petition to this Court that Rule 152(b) does not govern. Both the Court of Claims and the government have ignored this issue.

The government's argument under Rule 152(b) focuses exclusively on the issue of delay; but it mistates the amount of time involved. As the petition shows, the period from when the Pueblo discovered the misfeasance of its claims counsel to when it informed the Court of Claims of its intention to move for relief was at most four years and that delay was fully explained. See Petition 19-22. Like the Court of Claims, the government greatly

exaggerates the actual delay and ignores the explanations.

III. THE COURT OF CLAIMS HAS ERECTED AN IRREBUTTABLE PRESUMPTION AGAINST PETITIONER

The government characterizes the relief sought by Petitioner as discretionary with the Court of Claims, citing Andrade v. U.S., 485 F.2d 660 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974), as requiring "diligence" by the moving party. Examination of petitioner's diligence, however, is entirely absent from the Court of Claims opinion, as well as from the government's brief. Instead, the opinion raises the irrebuttable presumption that mere passage of a given amount of time automatically precludes relief. The Court did not abuse its discretion -- by fiat it ran roughshod over the procedural rights of petitioner.

The Andrade case cited by the

Government provides a good contrast to the cold-blooded treatment below. In Andrade the plaintiffs sought to overturn collaterally a final judgment of the ICC entered eight years previously. That judgment had already resulted in the appropriation of sums for payment of the government's liability. The earlier judgment was entered only after extended discussion and debate within the concerned tribes, carefully overseen by the ICC itself, followed by a vote of tribal members.[1]

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[1] The Court of Claims later cited the protections accorded in Andrade as the model of what was required when a major adjustment of a tribe's claim was made. Pueblo of Taos v. U.S. 515 F.2d 1404, (Ct. Cl. 1974). It noted particularly the need for inquiry into "whether the Indians had been given fair and unbiased advice by their counsel as to the merits of the proposed compromise, [and] whether adequate means were taken to inform them of the proposal..." Id. at 1407.

The ICC prepared extensive findings on the proceedings and Bureau of Indian Affairs officials were involved at every stage. The Andrade plaintiffs participated in the earlier episodes and knew of the alleged misconduct at the time of the earlier judgment. They offered no excuse for the eight year delay except lack of counsel. Under those circumstances, the Court of Claims refused to allow collateral attack on the prior judgment.

This case is much different. Relief is sought from an unauthorized interlocutory stipulation and order in a still-active case, and the petitioner makes multiple sworn allegations, uncontested by the government, which, if true, not only establish diligence, but render the challenged stipulation absolutely void. Petitioner offers explanations for the delay that did occur,

and unlike Andrade the tribe's governing officials specifically deny any approval for and any knowledge until the late 1970's of the challenged stipulation and decision. Nor, unlike Andrade, were any precautions taken in this case to ensure the informed consent of the Pueblo for a stipulation that radically altered its eighteen year old claims.

The iron-clad hostility of the Court of Claims to the Pueblo's position betokens a failure of principle premised on a broader hostility to Indian claims under the Indian Claims Commission Act. In Navajo Tribe of Indians v. U.S. 601 F.2d 536 (Ct.Cl. 1979), cert. denied, 444 U.S. 1072 (1980), the Court of Claims pointedly rationalized that "Unless drastic and effective steps are taken to expedite the proceedings in these Indian Claims Commission cases, they threaten to drag on indefinitely." Id. at 540.

In Temoak Band of Western Shoshone Indians, Nevada v. U.S., 593 F.2d 994 (Ct. Cl. 1979) cert denied 444 U.S. 973 (1979), the Court of Claims took "drastic" action and refused to allow the various bands of Western Shoshone out of a bitterly contested stipulation, holding them to their original pleading with the declaration that "when a claimant files a petition in the manner and form prescribed,... [t]he implied obligation of the claimant is to state his claim and stick to his statement, and to prosecute his claim diligently to adjudication..." Id. at 998. The Pueblo of Santo Domingo is seeking to do precisely that -- prosecute its claims pursuant to its original petition, consistent with its steadfast refusal to accede to confiscation of its ancestral lands. The Court of Claims has tribes coming and going.

The "drastic" action taken by the

Court in this case threatens not merely the original cause of action for damages, it threatens the Pueblo with a wholesale taking of its lands. The Government's response does not deny this. The interests at stake and the unbridled abuse of power by the Court of Claims are so singular they cannot be trivialized and dismissed out of hand.

IV. THE GOVERNMENT'S DISCUSSION OF AGENCY PRINCIPLES MISAPPLIES THE LAW AND IGNORES THE FACTS OF THIS CASE

The crux of Santo Domingo's Motion to Vacate was that its former claims counsel had no power to stipulate that the Pueblo's title to its lands had been extinguished. The government's excessively casual treatment of the evidence bearing on the question of counsel's authority obscures the fact that all of the evidence submitted with the Motion to Vacate tended to demonstrate

that the stipulation was unauthorized. Despite the notorious difficulty of proving a negative, Santo Domingo made a voluminous documentary record - roughly 130 pages of exhibits submitted with its Motion to Vacate - in support of the claimed lack of authority, while the government produced not a single scrap of evidence tending to demonstrate that the stipulation was authorized.

Indeed, the government cannot be expected to discover any evidence that the stipulation was authorized, since the claims attorneys when challenged, themselves admitted:

> I do not find in our correspondence with Santo Domingo specific reference at that time to the question of the relevance of the proposed negotiation of a settlement to the assertion in the original petition that none of the Pueblo's lands had been lost... I suspect that the foregoing information was passed to Santo Domingo orally.

(Exhibit T to the Motion to Vacate, below)

The "foregoing information" was the news that Santo Domingo's claim for trespass had been fundamentally transformed into a concession of title. All that claims counsel can offer on the question of their authority is the conjecture that information as to the stipulation passed to Santo Domingo orally.

This speculation is particularly flimsy, not only in light of the Pueblo's evidence that it was never consulted about the stipulation (see App. H to the Petition), but also in light of the uncontroverted fact that the stipulation was not submitted to or approved by the Commissioner of

Indian Affairs. (See App. 58h - 60h).

Despite the contractual provision requiring the Commissioner's approval of any "compromise, settlement, or other adjustment of the matters in controversy," the government asserts that the stipulation did not need such approval, relying entirely upon Navajo Tribe of Indians v. United States, 601 F.2d 536 (Ct. Cl. 1979), cert. denied, 444 U.S. 1072 (1980). That case, however, compels the opposite result here. In that case, the Court of Claims held that secretarial approval was not required for the withdrawal of claims where no consideration was given in exchange for such withdrawal. The Court was careful to state that tribal and secretarial approval is required when

claims are terminated "in return for some consideration given in exchange therefor." Id. at 539. This distinction, expressly drawn by the Court itself, recognizes that claims withdrawn in exchange for valuable consideration are valuable claims. The Court held in Navajo Tribe that such claims could not be compromised without governmental approval, under a provision virtually identical to the contractual provision at issue here.

It is uncontroverted that the stipulation herein was given for valuable consideration. The government itself states that the stipulation was made "in connection with a concession of liability by the adverse party" (U.S. Brief in Opposition, p. 6). Thus, the Navajo Tribe case itself forcibly

demonstrates that a stipulation such as the one here is precisely the sort of compromise or adjustment requiring the Commissioner's approval.

Moreover, given the stringent protection accorded Indian lands, including the incompetence of tribes to convey, it is simply inconceivable that a tribe's attorneys could willy nilly stipulate its lands away without any federal approval. Such action is the paradigm of what the contract was intended to prevent.

It must be remembered that the contractual provision requiring the Commissioner's approval for adjustments to claims was in the attorney contract <u>at the instance of the Federal Government itself</u>, for the protection of the tribes.[2] Not

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[2] See next page for footnote.

only does this fact demonstrate that the government had notice of the limitations on counsel's authority (see Petition 51-53) apart from having previously relied on the limitation itself; it also demonstrates a strong federal interest in the supervision and protection of Indian claims. Both Congress and the Courts have frequently and expressly recognized

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[2] See S. Rep. No. 8, 830 Cong. lst Sess. 4 (1953), in which federal supervision of the management of Indian claims is deemed to be necessitated in part by "wanton violations of contract provisions by attorneys, predicated upon the unsophistication of some Indian tribes; ... [and] flagrant misrepresentations of fact by attorneys to Indians and the public ..." At 4.

that Indian tribes, unlike the plaintiffs in Link v. Wabash R.R., 370 U.S. 626 (1962), must at times be protected even from their own counsel. (See dissent of Judge Nichols below, App. 11a-13a; 25 USC §70n; 25 USC §81; McMurray v. Choctaw Nation, 62 Ct.Cls. 458 (1926); Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927)).

The government's reliance on Link v. Wabash ignores that Indian tribes are not ordinary litigants, that Indian lands are especially protected, and that the tribe-attorney relationship is highly regulated. Moreover, unlike in Link, petitioner Pueblo of Santo Domingo does not merely stand to lose a cause of action; but faces the wholesale loss of its federally protected tribal lands, a loss of fundamental

significance it never intended to risk and which its guardian, the United States, never approved.

CONCLUSION

In enacting the Indian Claims Commission Act, Congress intended to draw in all claims of past wrongs and have them adjudicated, a plainly remedial purpose. If the action of Santo Domingo's former attorneys and the summary affirmance of that action by the Court of Claims is allowed to stand, the remedial purpose of the Indian Claims Commission Act will have been subverted and converted instead into a process of confiscation, a continuing wrong.

Respectfully submitted,

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